April 16, 2010

VIA ELECTRONIC FILING

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notification of *Ex Parte* Communication
MB Docket Nos. 06-121 and 02-277
MM Docket Nos. 01-235, 01-317, and 00-244

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that today, George L. Mahoney, Vice President, Secretary, and General Counsel of Media General, Inc. ("Media General"), and I met with Joshua Cinelli, Media Advisor to Commissioner Michael J. Copps, to discuss the positions that Media General took and the arguments that it set forth in the Opposition to Petition for Reconsideration that it filed on May 6, 2008, in the above-referenced dockets. A copy of the Opposition was provided at the meeting along with an excerpt from the *Congressional Record*. Copies of both are included with this filing.

Mr. Mahoney also discussed the receipt earlier this week by Media General's *Bristol Herald-Courier* of a Pulitzer Prize for public service for its reporting on the mismanagement of natural gas royalties owed to thousands of Virginia landlords. In the Tri-Cities, TN/VA Designated Market Area where the newspaper is located, Media General also owns WJHL(TV) in Johnson City, Tennessee. Mr. Mahoney explained that the *Bristol Herald-Courier*, as a small newspaper in a small town, only has seven reporters in its newsroom covering parts of Virginia and Tennessee that altogether equal the size of Connecticut. The reporter who wrote the Pulitzer Prize-winning eight-part series worked on the story for over a year. Mr. Mahoney explained that, because of cross-ownership and the greater resources it allows Media General to bring to local news coverage in a market, this small newspaper was able to dedicate such intensive efforts to development of one particular series. This Pulitzer Prize is the company's seventh. At today's meeting, Media General provided copies of the *Bristol Herald-Courier* series and a *Richmond Times-Dispatch* article on the smaller paper's selection for the Pulitzer. Copies of both are attached.

Mr. Mahoney also reviewed the history of Media General's convergence efforts, which began in Tampa where it owns and operates *The Tampa Tribune*, WFLA-TV, and TBO.com. Mr. Mahoney explained the set up of The News Center, the company's $35 million state-of-the-art facility, where all three platforms are based, and provided the attached picture of The News Center. He also explained that Media General delivers many of the same cross-ownership benefits in its small and medium-sized convergence markets, which include Roanoke-Lynchburg, Virginia; Tri-Cities, TN/VA, as noted above; Myrtle Beach-Florence, SC; and Columbus, GA. In addition, Mr. Mahoney provided details on how cross-ownership works in those markets and supplied the attached report by Adam Clayton Powell, III, that Media General had previously filed on October 23, 2006 and that details the public interest benefits. Mr. Mahoney emphasized that retention of the waivers that Media General received in the FCC's February 4, 2008 decision in MB Docket No. 06-121 is essential for these benefits to continue.

As required by Section 1.1206(b), as modified by the policies applicable to electronic filings, one electronic copy of this letter is being submitted for each above-referenced docket.

Very truly yours,

M. Anne Swanson

Attachment
cc w/attach. (by email):
Joshua Cinelli, Esquire

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate to Build on Earlier Studies	)	MB Docket No. 04-228
	)	
Public Interest Obligations of TV Broadcast Licensees	)	MM Docket No. 99-360

OPPOSITION TO PETITION FOR RECONSIDERATION

MEDIA GENERAL, INC.

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May 6, 2008

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SUMMARY

Objectors have filed an untimely request for Commission reconsideration of the permanent waivers that the FCC issued, grandfathering four Media General cross-ownerships as part of the FCC's decision in the 2006 Quadrennial Regulatory Review and *Prometheus* remand ("*2008 Decision*"). The waivers were clearly "non-rulemaking" actions even though they were issued in the context of a rulemaking proceeding. As explained herein, the FCC rules make unmistakably clear that, in exactly this situation, reconsideration petitions were due within 30 days of the February 4, 2008 release date of the *2008 Decision*. Objectors submitted their reconsideration request 19 days beyond that deadline, instead filing it 30 days after notice of the *2008 Decision* appeared in the Federal Register. While such submission was timely for the rulemaking portion of the *2008 Decision*, it was fatally late for the non-rulemaking aspects, like the waivers grandfathering Media General's cross-ownerships. The FCC cannot overlook this error since the 30-day deadline is statutory, and the Objectors' failure cannot be traced to any mistake on the FCC's part in giving notice.

In any event, Objectors' attack on the permanent waivers grandfathering the Media General cross-ownerships fails to demonstrate flaws in the FCC's analytic approach or the FCC's application of that analysis to the facts. Media General's cross-ownerships were legally established pursuant to footnote 25 of the 1975 decision adopting the original newspaper/broadcast cross-ownership rule. In deciding in this case to grandfather Media General's legitimate cross-ownerships, the FCC applied the same public interest calculus it used in grandfathering combinations in 1975, an analysis the Supreme Court affirmed. As the Court recognized, in potential divestiture situations, as opposed to the application of a prospective prohibition, "a mere hoped-for gain in diversity is not enough." Instead, as the Court said was appropriate in 1975, the FCC in this case rightly factored concerns like program service,

stability, and continuity of ownership into account. The FCC then noted examples of extensive public service delivered by the four cross-ownerships, examples supported by literally volumes of facts in the record. Objectors attack the FCC for providing inadequate evidence of any harm that would result from divestiture, wholly ignoring the extensive evidence in the record of the financial challenges faced by today's media, particularly newspapers. In any event, as the Supreme Court affirmed in just this context, such factual determinations or predictive judgments regarding harm are based on the expert knowledge of the agency and "complete factual support . . . is not possible or required."

Objectors contend that the FCC's grandfathering analysis strayed impermissibly from the waiver approach set forth in the *2008 Decision* or the one utilized by the FCC in the four permanent waivers of the newspaper/broadcast cross-ownership rule issued prior to the 2006 Quadrennial Review. The first claim ignores that the new rules are not yet effective and that other public interest challengers have argued the *2008 Decision* is stayed by the Third Circuit's 2003 *Prometheus* decision. Second, the Objectors' challenge overlooks that the four previous permanent waivers turned on an open-ended public interest analysis, which, in the end, cannot be legally differentiated from the public interest approach the FCC applied here.

The Objectors' additional criticisms of the details of the waiver standards as a whole must give way to the unmistakable conclusion that the newspaper/broadcast cross-ownership rule should have never been retained in the first place. The *2008 Decision* fails adequately to explain why the FCC retreated from the changes it adopted in 2003, changes that were mandated by Section 202(h) of the 1996 Act. Most seriously, retention of the rule continues to work a deprivation of the constitutional rights of Media General and other newspaper owners that hold or would like to own broadcast licenses. Objectors' carping at details cannot obscure that fundamental violation, which Media General expects the courts to rectify in the future.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)))))	MB Dockets No. 06-121 *et al.*

OPPOSITION TO PETITION FOR RECONSIDERATION

Media General, Inc. ("Media General"), by its attorneys, hereby opposes the Petition for Reconsideration filed by seven parties on March 24, 2008,[1] asking the FCC to review and modify its *Report and Order and Order on Reconsideration*, released on February 4, 2008.[2]

As shown below, under the Communications Act and procedural rule changes adopted in 2000, the *Petition* is untimely insofar as it asks the FCC to reconsider its grant in the *2008 Decision* of permanent waivers that grandfathered cross-ownerships in four of Media General's markets. That infirmity aside, Objectors' attack on the merits ignores that the issuance of the grandfathering waivers applied the same public interest calculus that the FCC has followed in the past, and the Supreme Court has affirmed, in similarly grandfathering cross-ownerships. The FCC's application of those public interest factors to Media General's cross-ownerships was fully supported by the facts in the record. Finally, contrary to Objectors' claims, the FCC, in its *2008 Decision*, should have repealed the newspaper/broadcast cross-ownership rule in its entirety. Merely tinkering with its waiver standards, as Objectors ask, is beyond the point.

[1] Petition for Reconsideration in MB Docket Nos. 06-121 *et. al.* (March 24, 2008) ("*Petition*"). The petitioners include Common Cause, Benton Foundation, Consumers Action, Massachusetts Consumers' Coalition, NYC Wireless, James J. Elekes, and National Hispanic Media Coalition ("Objectors").

[2] *2006 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act*, Report and Order and Order on Reconsideration, FCC 07-216 (rel. Feb 4, 2008) ("*2008 Decision*").

I. THE RECONSIDERATION PETITION IS UNTIMELY AND MUST BE DISMISSED AS IT PERTAINS TO THE PERMANENT WAIVERS THAT GRANDFATHERED MEDIA GENERAL'S CROSS OWNERSHIPS

Section 405(a) of the Communications Act requires that reconsideration petitions be submitted within 30 days of the issuance of a decision.[3] Since 2000, the Commission's rules have made unmistakably clear that, for adjudicatory decisions, including individual licensing and waiver decisions like grandfathering, the 30 days is to be measured from the date on which the Commission's decision is *released,* even when those decisions are included in a document produced as part of a rulemaking proceeding.

In this case, the *2008 Decision* was released on February 4, 2008. It included, among other determinations, grandfathering of Media General's four cross-ownerships, an adjudicatory decision clearly premised on permanent waivers of the cross-ownership rule.[4] Under the Act, the FCC's rules, and unambiguous precedent, petitions for reconsideration of such adjudicatory decisions were due on March 5, 2008, 30 days after the February 4 release. The *Petition* was not filed, however, until March 24, 2008, or 19 days after expiration of the applicable 30-day time period. As explained in this section, this tardiness leaves the Commission no choice but to dismiss the challenge to the permanent waivers that grandfathered Media General's cross-ownerships since the 30-day deadline is a statutory one.

The FCC's rules include two different provisions implementing Section 405(a)'s 30-day deadline: Section 1.106, which relates generally to reconsideration of adjudicatory matters, and Section 1.429, which pertains to reconsideration of rulemaking proceedings.[5] Both sections include virtually identical language elaborating on the filing specifics that implement

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[3] 47 U.S.C. § 405(a).

[4] *2008 Decision* at ¶ 77.

[5] 47 C.F.R. §§ 1.106 and 1.429, respectively.

Section 405(a). Both sections direct litigants to Section 1.4(b) of the FCC's rules for the mechanics of computing time deadlines.[6]

Section 1.4(b), however, differentiates between rulemaking and non-rulemaking decisions and includes a note that makes clear that petitioners in this case have submitted an untimely request. Section 1.4(b)(1) first provides that, for decisions in notice and comment rulemaking proceedings, "public notice" is defined as the date of the document's publication in the Federal Register; Section 1.4(b)(2) provides that for all non-rulemaking determinations, "public notice" means the release date of the document.[7] The note to Section 1.4(b)(1) states that "[l]icensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2)," which operates to require submission of reconsideration requests within 30 days of release of a decision.[8]

The administrative history of Section 1.4(b) further makes clear that requests for reconsideration of the grandfathering waivers that Media General received are procedurally governed by Section 1.4(b)(2) of the FCC's rules and that subsection's earlier deadline. In adopting the current rule in 2000, the FCC specifically stated that:

> [a]djudicatory matters, *e.g.,* individual licensing decisions *and waivers as to specific parties*, do not come within the scope of Section 1.4(b)(1), even if the decisions happen to be related to, or issued in, an on-going rulemaking docket.[9]

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[6] 47 C.F.R. § 1.4(b). The relevant language in Section 1.106 provides that "[t]he petition for reconsideration and any supplements thereto shall be filed within 30 days from the date of *public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules*, ..." 47 C.F.R. § 1.106(f) (emphasis supplied). Section 1.429's language is identical except that it specifies the deadline as "30 days from the date of public notice of *such* action," before referring parties to Section 1.4(b). 47 C.F.R. §§ 1.429(d) (emphasis supplied).

[7] 47 C.F.R. §§ 1.4(b)(1) & (2).

[8] 47 C.F.R. § 1.4(b)(1), Note.

[9] *Amendment of Section 1.4 of the Commission's Rules relating to Computation of Time*, Memorandum Opinion and Order, 15 FCC Rcd 9583, 9584 (2000) (emphasis supplied).

In reaching this result, the Commission explained that it was clarifying its rules to remove confusion and correct a problem that had been highlighted by the United States Court of Appeals for the District of Columbia Circuit in *Adams Telcom, Inc. v. FCC.*[10] In that decision, the court had held that, while it was reasonable for the Commission to apply different approaches to triggering time periods for seeking review of adjudicatory and non-adjudicatory orders, the FCC's rules needed to clearly specify the distinction.[11] Since 2000, Section 1.4 of the Commission's rules has made this distinction unambiguously clear so that requests for reconsideration of waivers and other non-rulemaking determinations, such as those issued to Media General, are now due 30 days after the release date of a document even if that document was issued as part of a rulemaking proceeding.

Since its 2000 clarification, the Commission has applied the new approach to dismiss several petitions for reconsideration of adjudicatory decisions made in the context of rulemaking when those petitions were not filed within 30 days of the *release date* of the rulemaking decision. In 2003, the Commission rejected portions of a petition for reconsideration related to adjudicatory matters filed by an applicant whose license applications had been dismissed as part of a broader Commission rulemaking order.[12] The Commission in that decision partially dismissed the petition for reconsideration that had been submitted within 30 days of Federal Register publication but was filed more than 30 days after the order's earlier release date, "to the extent that the petition relates to [a] particular application."[13] Later the same year, the

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[10] 997 F2d 955 (D.C. Cir. 1993).

[11] *Id.* at 957.

[12] *Amendment of the Commission's Rules Concerning Maritime Communications*, Third Memorandum Opinion and Order, 18 FCC Rcd 24391, 24397 (2003).

[13] *Id.* In that case, the Commission distinguished the petition it partially rejected from another acceptable one that separately sought reconsideration of the adjudicatory order because the latter had been filed within 30 days of the order's release date. *Id.* at 24396. The Commission also

Commission dismissed as untimely two parties' petitions for reconsideration of the adjudicatory denial of waiver requests included in a rulemaking order because again the parties filed their requests within 30 days of Federal Register publication of the rulemaking but more than 30 days after the Commission's release of the decision itself.[14]

In this case, the reconsideration petition was likewise filed within 30 days of publication of the *2008 Decision* in the Federal Register but not within 30 days of the release of the *2008 Decision*. It was filed 49 days after that release. As a result, the Commission's rules clearly require dismissal of the *Petition* to the extent that it requests reconsideration of the adjudicatory decision grandfathering Media General's cross-ownerships. The Commission does not have discretion to waive the 30-day filing requirement set forth in Section 405(a) of the Act unless "a procedural violation by the Commission" has made it "impossible reasonably for the party to comply with the filing statute."[15] The only occasions when the Commission has waived Section 405(a)'s timing requirements have been when the Commission itself failed to provide adequate notice of its decision, thereby preventing the party seeking reconsideration from receiving actual notice of the decision in a timely manner.[16]

In a proceeding as highly publicized as this, it is inconceivable that Objectors did not receive actual notice of release of the *2008 Decision* in time to submit a timely petition. Objectors have not even attempted to plead exceptional circumstances, nor is it likely that they

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dismissed a curiously styled "Erratum Petition" of its adjudicatory decisions that was filed more than 30 days after release of the order. *Id.* at 24397.

[14] *ACR Electronics, Inc. and McMurdo Limited*, Order on Reconsideration, 18 FCC Rcd 11000, 11001 (2003).

[15] *Gardner v.* FCC, 530 F2d 1086, 1091-1092 n.24 (D.C. Cir. 1976).

[16] *Id.* at 1091-1092. *Winbeam, Inc.*, 20 FCC Rcd 8741, 8745 (2005); *Gary E. Stoffer*, 13 FCC Rcd 14056, 14058-59 (1998). *See also Virgin Islands Telephone Corp. v FCC*, 989 F2d 1231 (D.C. Cir. 1993); *Reuters, Ltd. v. FCC*, 781 F2d 946, 951-952 (D.C. Cir. 1986).

could. Accordingly, the Commission must dismiss the *Petition* as it relates to the permanent waivers grandfathering Media General's four cross-ownerships.

II. THE FCC'S DECISION TO GRANDFATHER FOUR MEDIA GENERAL CROSS-OWNERSHIPS, SIMILAR TO THE AGENCY'S 1975 DETERMINATIONS FOR OTHER COMBINATIONS, WAS BOTH IN THE PUBLIC INTEREST AND WITHIN ITS ADMINISTRATIVE DISCRETION

In the *Petition*, Objectors challenge the FCC's decision to grandfather four Media General cross-ownerships, granting them permanent waivers of the cross-ownership rule and doing so, as the FCC said, "in the same manner as the Commission did in 1975."[17] They contend that the FCC applied the wrong legal test and instead should have discussed the "four-factor" test it has followed in permanently waiving the cross-ownership rule for proposed cross-ownerships or the waiver tests announced as part of the *2008 Decision.* Objectors also argue that the FCC provided inadequate factual justification for its result.[18]

Objectors' contention that the grandfathering was improper seems to be based, in part, on their insinuations that these combinations were improperly formed and lacked a *bona fide* basis for their existence. Their arguments ignore that, at root, the touchstone for whether cross-ownerships should continue is whether they serve the "public interest," something that the FCC here analyzed in a manner entirely consistent with its own and court precedent. Contrary to Objectors' arguments, the FCC applied the correct analysis, as shown in this section. Further, its application of that analysis was fully supported by record facts, as discussed in the next section.

In 1975, the FCC not only adopted the cross-ownership ban, but the agency had to address how to apply that rule change to legally established combinations. The prospective rule had been adopted despite the fact that no claim had been made that "newspaper-television station owners [had] committed any specific non-competitive acts" and that the FCC's own review of

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[17] *2008 Decision* at ¶ 77.

[18] *Petition* at 7-11.

the effect of newspaper ownership on television advertising rates "fail[ed] to show an effect on rates attributable to newspaper ownership."[19] The agency also noted that it could not ascertain any "basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership."[20] Rather, it adopted the cross-ownership rule solely because "[w]e think that any new licensing should be expected to add to local diversity."[21] The United States Supreme Court, in affirming the FCC's ban, commented on the "inconclusiveness of the rulemaking record,"[22] noting that the FCC "did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'speak with one voice' or are harmful to competition."[23] The Supreme Court, nonetheless, found that the FCC's decision to give controlling weight to the "goal" of diversification in shaping the *prospective* rules was a "reasonable administrative response" and that diversification was a justifiable public interest goal on which to ground the new prospective rules.[24]

When it came time to analyze the grandfathering of existing combinations, however, the FCC, as affirmed by the Supreme Court, utilized a different and broader public interest calculus, one in which "a mere hoped-for gain in diversity is not enough."[25] In its adjudicatory

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[19] *Amendment of Section 73.34 [sic], 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1072-73 ("*1975 R&O*"), *recon.* 53 FCC 2d 589 (1975), *modified by Nat'l Citizens Committee for Broad. v. FCC,* 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part, FCC v. Nat'l Citizens Committee for Broad.*, 436 U.S. 775 (1978) ("*NCCB*").

[20] *1975 R&O* at 1075.

[21] *Id.*

[22] *NCCB,* 436 U.S. at 796.

[23] *Id.* at 786. In the intermediate appeal, even the D.C. Circuit, which thought the FCC had not gone far enough in applying the restriction to existing combinations, acknowledged that the FCC had adopted the ban "without compiling a substantial record of tangible harm" and that the record included "little reliable 'hard' information." *NCCB v. FCC,* 555 F.2d at 944,956.

[24] *NCCB,* 436 U.S. at 795-97.

[25] *1975 R&O,* 50 FCC 2d at 1078.

grandfathering decisions, the FCC said it would examine additional considerations "relevant under our broad public interest mandate"[26] and explained that "[i]n our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued . . . . Particularly in connection with a number of entities, there is a long record of service to the public."[27] In this review, the FCC noted that "[a]scertaining and endeavoring to serve local needs was the key point, and some standard had to be developed to indicate where this was a reasonable expectation and where it was not."[28]

The Supreme Court affirmed the FCC's approach, which did not simply give controlling weight to diversity:

> the weighing of policies under the "public interest" standard is a test that Congress has delegated to the Commission in the first instance, and we are unable to find anything in the Communications Act, the First Amendment, or the Commission's past or present practices that would require the Commission to "presume" that its diversification policy should be given controlling weight in all circumstances.[29]

The Court indicated that such an analysis, focused only on diversification, would be inconsistent with other policies emphasizing local service. It approvingly noted that the FCC, in the renewal context, had made clear that "diversification . . . [is] a factor of less significance when deciding whether to allow an existing licensee to continue in operation than when evaluating applicants seeking initial licensing."[30] Rejecting the Court of Appeals' call for total divestiture, the Supreme Court stated that the FCC had rightly factored concerns like stability and continuity of ownership into its public interest analysis of grandfathering and that the FCC had not "acted irrationally in concluding that these public interest harms outweighed the potential gains that

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[26] *Id.* at 1080.

[27] *Id.* at 1078.

[28] *Id.* at 1081.

[29] *NCCB,* 436 U.S. at 810.

[30] *Id.*

would follow from increasing diversification."[31] Based on this approach, the FCC grandfathered all but "egregious" combinations, which included the television stations owned by the local newspapers which were the only electronic outlets of their kind in the community.

In granting permanent waivers grandfathering the Media General cross-ownerships, the FCC used the same calculus, analyzing a number of public interest concerns. The FCC first noted that these combinations consisted of but a single broadcast station and newspaper.[32] In addition, not allowing these combinations to continue would have created the same type of disruption that had concerned the FCC and the Supreme Court in the 1970s.[33] The FCC found that this adjudicatory decision was premised on five public interest concerns that echoed the Supreme Court's affirmance of the FCC's 1975 grandfathering determinations:

> Specifically, in the following cases, we have determined that the public interest warrants a waiver in light of the synergies that have already been achieved from the newspaper/broadcast station combination, the new services provided to local communities by the combination, the harms . . . associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban, and the length of time that the waiver request has been pending . . . .[34]

This emphasis on proven service to local communities and the FCC's public interest in maintaining it was wholly consistent with the approach affirmed by the Supreme Court when it reviewed the *1975 R&O*.

Objectors attempt to establish that the Media General situation is somehow inapposite from what was before the Commission in 1975, arguing that then there were many more combinations and attempting to imply that Media General formed the cross-ownerships with "unclean hands" -- "they held broadcast licenses in full knowledge that the FCC's rules prohibited such combinations and that they would be required to divest before license

[31] *Id.* at 804-05.

[32] *2008 Decision* at ¶ 77.

[33] *Id.*

[34] *Id.* (footnote omitted).

renewal."[35] This suggestion that Media General's combinations were illegally formed is wholly mistaken. Each combination was created when a television licensee acquired a newspaper, a practice permitted under footnote 25 of the *1975 R&O* itself and allowed to continue for "1 year or . . . [until] the time of the next renewal date, whichever is longer."[36] Objectors have consistently opposed any cross-ownership, calling in the comment period for no liberalization to the rule.[37] They also have made clear their dislike of footnote 25, calling now on reconsideration for a change in the legitimate process that the FCC established decades ago to address acquisitions of newspapers over which it lacks jurisdiction.[38] Objectors' predilections, however, cannot de-legitimize Media General's reliance on established FCC procedures or diminish the propriety of Media General's legally established combinations.[39] The FCC's decision now, in the context of the larger rulemaking, to issue permanent waivers that grandfathered Media General's four legitimately formed combinations was fully consistent with the FCC's earlier public interest calculus and well within its discretion.

Objectors' attempt to demonstrate that the FCC incorrectly ignored the "four-factor" test that had been utilized in four earlier permanent waiver cases mistakenly overlooks that this test, if even Objectors succeed in showing it should apply, incorporates many of the same public interest indicia that the FCC applied in the adjudicatory relief that it provided to Media General.

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[35] *Petition* at 9 n.29.

[36] *1975 R&O* at 1076 n.25.

[37] *E.g.,* Comments of Office of Communication of United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause and Benton Foundation in MB Docket Nos. 06-121, *et. al.* (Oct. 23, 2006) at 60-73.

[38] *Petition* at 6-7.

[39] "[W]hen it established the cross-ownership rules, the Commission expressly contemplated waivers of newly created combinations brought about through a television licensee purchasing a daily newspaper. *Second Report and Order*, 50 FCC Rcd 1046, 1076 n.25 (1975), *aff'd sub nom., FCC v. NCCB,* 436 U.S. 775 . . . ." *Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1041 n.4 (D.C. Cir. 1987).

This "four-factor" test provides for alternative circumstances in which waivers may be warranted:

> (1) where a licensee is unable to sell a station; (2) where the only sale possible would be at an artificially depressed price; (3) where separate ownership and operation of the newspaper and the broadcast station could not be supported in the locality; or (4) *where, for whatever reason, the purposes of the rule would be disserved by its application.*[40]

While the test includes three very specific criteria focused on financial difficulty, the fourth alternative is much broader and specifically calls for a public interest review. Prior to this 2006 Quadrennial Review, the FCC had granted four permanent waivers of the cross-ownership rule; all of them under the fourth "public interest" criterion.[41] In making evaluations under this fourth "public interest" criterion, the FCC will consider any "special circumstances" advanced by a party as having a bearing on the appropriateness of granting a waiver.[42]

This emphasis in the fourth alternative on the "public interest" with respect to determining "where, for whatever reason, the purposes of the rule would be disserved by its application" is exactly what the FCC did in this case when it followed the 1975 grandfathering approach. As the United States Court of Appeals for the Third Circuit recognized almost four years ago in addressing the policy goals related to the rule, newspaper/broadcast combinations can promote localism, and a blanket prohibition on newspaper/broadcast combinations is not necessary to protect diversity.[43] On remand, in grandfathering Media General's cross-

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[40] *Kortes Communications, Inc.*, 15 FCC Rcd 11846, 11851 (2000) (emphasis supplied).

[41] *Id. Columbia Montour Broadcasting Co., Inc.*, 13 FCC Rcd 13007, 13012-13 (1998); *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5349-50 (1993), *aff'd sub nom Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995); *Field Communications Corp.*, 65 FCC 2d 959, 960-61 (1977).

[42] *Kortes*, 15 FCC Rcd at 11851.

[43] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398-400 (3d Cir. 2004) ("*Prometheus*"), *cert. denied*, *Media General, Inc. v. FCC*, 545 U.S. 1123 (2005). Although this decade began with the FCC citing "competition" as one of the goals to be served by the newspaper/broadcast cross-ownership rule, the *Prometheus* court noted that the FCC, in modifying the cross-ownership rule in 2003, had determined that the ban was no longer necessary to promote

ownerships, the FCC took these localism and diversity conclusions into account. The FCC noted that it based its determination that grandfathering was warranted on synergies and new services the Media General cross-owned properties had brought to their local markets. The FCC highlighted these conclusions with illustrative facts from the record, examples amply backed up by literally volumes of factual support that Media General had submitted in the rulemaking record.[44] The FCC's cited examples recounted the localism benefits of the combinations; they also showed why prohibiting the Media General cross-ownerships was not necessary to protect diversity because they documented how the flow of information to the licensee communities had increased vastly through cross-ownership and marketplace changes. Then -- certainly in keeping with the "for whatever reason" language from the terms of the fourth criterion -- the FCC added that grandfathering these four combinations on a permanent basis was warranted by "the harms . . . associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban, and the length of time that the waiver request has been pending," also harkening back to the 1975 analytic approach.[45]

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competition in local markets. The FCC had found most advertisers do not view newspapers and television stations as close substitutes and that no party challenged this finding on appeal. *Id.* at 398. In the *2008 Decision*, the FCC stated that it no longer believes that the rule is needed to ensure competition in *any* relevant product market. *2008 Decision* at 23 n.131 (emphasis supplied).

[44] *2008 Decision* at ¶ 77. *See* Section III *infra.*

[45] *2008 Decision* at ¶ 77. Objectors briefly contend, *Petition* at 8, that the FCC failed to apply the *2008 Decision*'s new waiver criteria in grandfathering the combinations. First, this contention overlooks that the new standards are not yet effective. *See, e.g., Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 73 Fed. Reg. 15156 (2008) (seeking OMB consent on forms necessary to implement newspaper/broadcast cross-ownership changes); *2008 Decision* at ¶ 155. Second, the argument is totally inconsistent with other public interest parties' contentions in a separately filed collateral attack on this same action that effectiveness of the *2008 Decision* has been stayed by the Third Circuit in *Prometheus*. *See Application for Renewal of License of WJHL-TV, Johnson City, Tennessee, BRCT-20050401BYS, et. seq.*, Application for Review of Free Press and NAACP (Apr. 24, 2008) at 17. It cannot be stayed there and operative here. If the new criteria were operative, Media General would be required to defeat the negative presumption that would apply because of market size by demonstrating satisfactory levels of concentration,

Thus, the FCC's rationale to support its permanent waivers grandfathering Media General's four cross-ownerships was, contrary to Objectors' contentions, clearly consistent with past precedent -- whether it be the *1975 R&O* or the "public interest" criterion utilized in the four subsequent instances in which the FCC has granted permanent waivers. The FCC has "wide" discretion both in how it analytically makes decisions, like waivers that grandfather and affect licensing, and in the predictive judgments supporting its waiver decisions.[46] The logic with which it approached Media General's situation was grounded in both precedent and rationality. Objectors' dislike of the outcome is not accompanied by any proffered reason to change it.

III. THE FACTS IN THE RULEMAKING RECORD FULLY SUPPORT THE ADJUDICATORY DECISION TO GRANDFATHER MEDIA GENERAL'S FOUR CROSS-OWNERSHIPS

In explaining the grandfathering which Objectors oppose, the FCC cited to increased public interest benefits Media General's cross-ownerships have rendered in each of their four markets. While providing the highlights, the *2008 Decision* in no way did justice to the extensive recitation of benefits Media General has supplied during the last six and one-half years this proceeding and its predecessors have been open before the FCC.

First and foremost, three of the four combinations at issue deliver appreciably more local news and public affairs programming than they were offering prior to cross-ownership. WJHL-TV in Johnson City, Tennessee, has increased its local news and public affairs by seven and one-half hours per week; WRBL(TV) in Columbus, Georgia, offers an additional five hours; and

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increased local news, continued independent news judgment at the outlets, and need for financial relief. The same synergies and increased local news offerings, combined with the evidence Media General supplied in comments on the lack of any competitive harm, its outlets' independence in decisionmaking, and the adverse financial conditions facing media outlets would be sufficient to warrant a waiver under even the new standards which other public interest parties claim in another pleading are not yet in effect.

[46] *NCCB*, 436 U.S. at 813-814; *Ellis v. Tribune Television Co.*, 443 F3d 71, 73 (2nd Cir. 2006).

WMBB(TV) in Panama City, Florida, increased its total by 30 minutes a week.[47] In the one exception, WBTW(TV) in Florence, South Carolina, the station was already delivering the most local news of all the new cross-owned stations at the time Media General acquired it; there, the news total has simply remained the same, although the station has added an additional half-hour of public affairs programming each week.[48] Thus, WBTW(TV)'s overall total of local news and public affairs programming has increased since convergence began. All four stations increased their news and public affairs programming since Media General acquired them.

While the FCC cited several additional specifics on each of the Media General stations, the record is replete with examples of how, working together, the co-owned newspaper and television station in each market have been able to cover more breaking news stories, report on more diverse ideas from different sources, investigate governmental and institutional abuse, and deliver more emergency weather coverage than they could each have done acting alone. While Objectors call the examples "self-serving," *Petition* at 10, the volumes of facts belie the claim.

WJHL-TV, in particular, has been able to increase its political coverage and electoral reporting in the Tri-Cities, TN-VA DMA since it became a cross-owned outlet. Examples in the record have included:

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[47] As noted in Media General's comments, the news totals are as follows:

Station	Prior to Convergence	Fall 2006	Increase
WJHL-TV (Tri-Cities)	18 hrs, 47½ mins	26 hrs, 17½ mins	7 hrs, 30 mins
WRBL(TV) (Columbus)	16 hrs, 45 mins	21 hrs, 45 mins	5 hrs
WMBB(TV) (Panama City)	20 hrs, 15 mins	20 hrs, 45 mins	30 mins

Comments of Media General in MB Docket No. 06-121 (Oct. 23, 2006) ("*Comments*"), Vol. 2, Statement of Adam Clayton Powell, III ("*Powell*"), at Exhibit C, p. 4 and Tab 1 (WJHL-TV); Exhibit E, p. 4 and Tab 1 (WRBL(TV)); Exhibit F, p. 4 and Tab 1 (WMBB(TV)).

[48] The news totals for the station are as follows:

Station	Prior to Convergence	Fall 2006
WBTW(TV)	20 hrs, 30 mins	20 hrs, 30 mins

Powell at Exhibit D, p. 4 and Tab 1.

-- Three-day series of live reports on opening of Tennessee legislature with reporting and analysis from WJHL-TV and reporters from the co-owned *Bristol Herald Courier*. (*Powell*, Exhibit C at 6)

-- Coverage of Virginia Governor Tim Kaine's 2006 inauguration; the station and paper shared reporting; print reporters appeared in on-air segments. (*Powell*, Exhibit C at 6-7)

-- Questionnaires sent by *Herald Courier* to candidates before elections; answers reported in print, on-air, and on-line. (*Powell*, Exhibit C at 7)

-- Station's pre-election profiles of candidates -- in 2006 TN state primary and local general elections, WJHL-TV broadcast profiles of all candidates in 9 races -- included interviews with *Herald Courier* reporters with specialized knowledge and long-time contacts. (*Powell*, Exhibit C at 7-8)

-- Similar pre-election profiles for November 2005 Virginia general elections. (*Powell*, Exhibit C at 8)

-- WJHL-TV's special reports on candidates, issues, and voting process in the 2004 primary elections included much deeper coverage of Virginia subjects because of station's access to *Herald Courier* reporters. (*Powell*, Exhibit C at 9)

-- Expanded election night coverage -- access to *Herald Courier* and WJHL-TV reporters allowed station to provide results and deeper analysis much more quickly. (*Powell*, Exhibit C at 7-10)

In the *2008 Decision*, the FCC referred to the fact that the reporting of WBTW(TV) in Florence, South Carolina has benefited from relying on its co-owned newspaper's archives and support in preparing special and investigative pieces. Examples in the record have included:

-- Station's 2004 special report on fifty-year anniversary of *Brown v. Board of Education*, using extensive archival information from the *Morning News*. (*Powell*, Exhibit D at 8)

-- WBTW(TV) report on hurricane dangers in locally produced "Storms of the Century" relied on *Morning News* archives. (*Powell*, Exhibit D at 7)

-- Hurricane coverage -- WBTW(TV) and the *Morning News* work together each year to produce a hurricane guide, which is distributed in print copies of the newspaper and available at the station and on-line. (*Powell*, Exhibit D at 5-6)

-- Extended coverage of the planning and construction of Interstate 73, proposed route from Michigan to SC coast -- In 2004 reporters traveled to Washington together to report on lobbying efforts to increase funding. Presence of reporters from both outlets allowed increased sourcing. (*Powell*, Exhibit D at 8) WBTW(TV), *Morning News*, and local public TV station in 2004 and 2005 held three "town hall" meetings on the proposed highway; WBTW(TV) provided on-air coverage. (*Powell*, Exhibit D at 8)

-- Combined efforts by reporters for both outlets led to eventual release of a videotape of incident in which Dillon, SC police officers were accused of using racially offensive language. (*Powell*, Exhibit D at 9)

For WRBL(TV) in Columbus, Georgia, the *2008 Decision* noted that, through convergence, the station is better able to cover the western half of its DMA due to the broadcast bureau it has established and staffed in the newspaper's building approximately 30 miles to the west. As the comments repeatedly showed, the station's collaboration with newspaper reporters to the west has, at the same time, freed up some of the station's own reporters to provide expanded coverage of the eastern DMA. Examples in the record include:

-- Breaking news coverage greatly improved through tips -- March 2005 WRBL(TV) tipped off by newspaper reporter to explosion at a factory in Lanett. WRBL(TV) was first in DMA to report this on-air; *Opelika-Auburn News* followed up with independently produced story next day. (*Powell*, Exhibit E at 5-6)

-- February 2005, *Opelika-Auburn News* reporter broke story of a lawsuit alleging abuse of students at local military academy -- WRBL(TV) reporter followed up with additional reporting and interviews. Reporters from both outlets collaborated on continuing coverage as the story developed. (*Powell*, Exhibit E at 6)

-- February 2005 coverage of story that dismissal of Auburn University athletics personnel was racially motivated -- *Opelika-Auburn News* reporter was the only person able to obtain an interview with the person making the allegations and shared this information with WRBL(TV). (*Powell*, Exhibit E at 6-7)

-- 2006 story of legitimacy of grades given to Auburn University football players -- WRBL(TV) reporters conducted interviews and provided information to newspaper reporters, who used it to supplement their own reporting. (*Powell*, Exhibit E at 7)

-- Coverage of federal environmental trial in eastern Alabama -- WRBL(TV) reporter attended morning sessions and reported in evening news; newspaper reporter attended in afternoon. The reporters shared their notes and research. (*Comments* at 19)

-- "State of Secrecy" series -- in consultation with Alabama Council for Open Government, the two outlets investigated and reported on openness and accountability of government records in many of DMA's small towns and municipalities. Newspaper reporters investigated the Alabama counties, and WRBL(TV)'s reporters investigated those in Georgia. Together, they provided a comprehensive regional review and comparison. WRBL(TV) broadcast two days of on-air; newspaper had five-day series of reports. (*Powell*, Exhibit E at 10)

Finally, as the *2008 Decision* noted, WMBB(TV) in Panama City, Florida, a station in Media General's smallest cross-owned market (DMA # 154), through convergence, has been able to increase its hurricane coverage, political forums, and investigative reporting. Examples in the record include:

-- Hurricane coverage -- WMBB is located on the coast, while the co-owned *Floridan* is located more to the north and inland. During Hurricane Denis in 2005, WMBB stationed a reporter in the *Floridan*'s newsroom and broadcast live reports as part of its wall-to-wall coverage, including interviews with emergency management officials. With this second base in the northern part of the DMA, the station could provide much more information on evacuation routes and particular dangers, such as tornadoes, faced by residents in that part of the DMA. Similar efforts occurred in 2004 for Ivan and other serious hurricanes. (*Powell*, Exhibit F at 5-9)

-- Election night coverage -- access to both outlets' reporters allows each to cover more races in greater depth, particularly in this market where television station and newspaper serve different parts of the DMA. (*Powell*, Exhibit F at 12-13)

-- In 2004, the outlets teamed up on investigation of a group that had purchased highly critical print and TV advertisements related to a candidate for state's attorney. WMBB(TV) obtained documents, and *Floridan* reporter with expertise in fundraising records analyzed them. (*Powell*, Exhibit F at 13-15)

-- Outlets worked together to overcome governmental officials' resistance to investigate and report on story regarding allegations of sexual misconduct involving a young girl that was levied against a Jackson County sheriff's deputy. (*Powell*, Exhibit F at 15)

-- 2002 -- WMBB(TV) received "tip" that local officials were investigating a local school for troubled boys and shared it with *Floridan*, which was able to use extensive contacts to determine investigation's status. (*Powell*, Exhibit F at 16)

-- 2002 -- WMBB(TV) worked with *Floridan* and papers in Dothan, AL DMA to research and present special reports on controversial proposal for Interstate connector. (*Powell*, Exhibit F at 16)

Objectors also criticized the *2008 Decision* for failing to provide any specific harms that would be caused by forced divestiture, harms that would undoubtedly be exacerbated by the prolonged nature of this proceeding and the length of cross-ownership, concerns which the FCC cites and Objectors say are irrelevant. In the late 1970s, the FCC's 1975 grandfathering decision came under similar attack. The Supreme Court, however, in affirming the FCC's analytical approach to divestiture and its factual evaluations, found that such specificity was not required:

> The Court of Appeals' final basis for concluding that the Commission acted arbitrarily in not giving controlling weight to its divestiture policy was that the Court's finding that the rulemaking record did not adequately "disclose the extent to which divestiture would actually threaten" the competing policies relied upon by the Commission . . . . However, to the extent that factual determinations were involved in the Commission's decision to "grandfather" most existing combinations, they were primarily of a judgmental or predictive nature . . . . In such circumstances, complete factual support in the record for the Commission's judgment or prediction is not possible or required: "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency."[49]

In this instance, the FCC's factual determinations or predictions regarding potential harms are entitled to the same deference and clearly should not be disturbed on reconsideration.

IV. THE FCC MISTAKENLY MADE ONLY THE MOST MODEST OF CHANGES TO ITS NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE AND SHOULD HAVE ELIMINATED IT ENTIRELY

While Objectors make suggestions as to how the *2008 Decision* can be made more regulatory in certain specifics,[50] Media General submits that the FCC erred, as a matter of statutory and constitutional law, in not completely eliminating the newspaper/broadcast cross-ownership rule in all markets. The waiver procedures that the FCC merely grafted onto the former rule, which it retained in its entirety, are not only impermissibly narrow in scope and specifics but the criteria set forth for waiving future combinations are based on legally discredited FCC models. Rather than make minor modifications to the changes that the FCC did adopt in the *2008 Decision*, the agency should repeal the newspaper/broadcast cross-ownership rule and the recent standards it has added to it for at least four reasons, which were more fully developed in the record.[51]

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[49] *NCCB*, 436 U.S. at 813-14.

[50] *Petition* at 2-7.

[51] *See, e.g.,* Comments of Media General in MB Docket Nos. 06-121, *et al.* (Dec. 11, 2007) at 1-24 ("*MG Dec. 11, 2007 Comments*"); *Comments* at 66-98; Comments of Media General in MB Docket Nos. 02-277, *et al.* (Jan. 2, 2003) at 25-75; Comments of Media General in MM Docket Nos. 01-235 and 96-197 (Dec. 3, 2001) at 18-86.

First, the FCC already found in 2003, and the United States Court of Appeals for the Third Circuit agreed in 2004, that the former rule was not necessary to fulfill the FCC's interest in promoting competition, localism, or diversity, and that it counterproductively harmed localism. The FCC found repeal mandated by Section 202(h) of the 1996 Telecommunications Act, and the court agreed.[52]

The *Prometheus* court "sum[med] up" the standard of review that it would apply in any future evaluation of the FCC's actions: "In a periodic review under § 202(h), the Commission is required to determine whether its then-extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified."[53] The *2008 Decision* does an inadequate job of addressing the lack on remand of any credible evidence showing that the former rule remains "useful" or that any need remains under Section 202(h) to substitute somewhat lessened regulation, such as adopted in the *2008 Decision*, for the previous rule. The FCC and the court already found the earlier rule was unnecessary to advance competition or localism, and the ever-growing abundance of sources of news and information, particularly local, should have mooted any further FCC concern over "diversity." Given that review has now become quadrennial, the FCC's statutory burden to ensure that its rules keep pace with marketplace realities is that much stronger. The *2008 Decision* did not establish, nor could it, that any trends suggest a future decrease in abundance that somehow warrants four more years of regulation.

Long-established administrative law precedents equally compelled total repeal. The FCC itself acknowledged in 1975 that there was no evidence of a competitive harm mandating the former rule; the speculative "hoped-for" gain in diversity upon which it has premised has never

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[52] *Prometheus*, 373 F.3d at 398-400, *citing 2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd at 13749, 13754, 13764-66 (2003).

[53] *Prometheus*, 373 F.3d at 395.

materialized. This time around, the FCC thus had no legal choice but to repeal the former rule. A regulation reasonable in the face of a problem becomes highly capricious when the problem is shown no longer to exist.[54]

In fact, the FCC's abrupt change of course in 2008, which, as the Chairman acknowledged, decreased cross-ownership regulation much less and in fewer markets than had been done with the cross-media limits in 2003, similarly violated administrative law precedent. Such a change in course requires clear and compelling evidentiary support and a detailed and persuasive explanation for reversing direction.[55] The *2008 Decision* does an inadequate job of explaining why the record warranted a more conservative approach than it had a half decade earlier.

Second, the decision to limit "presumptive relief" to only the Top 20 television markets is highly arbitrary, ignoring that FCC precedent decries such DMA line-drawing. Moreover, missing from all of the studies in the record -- the FCC's latest set of peer reviewed studies, the earlier 2002 studies, and the empirical reviews filed by parties -- was any indication that the results were dependent on market size.

In modifying the radio/television cross-ownership rule in 1999, the FCC itself acknowledged that line-drawing based on DMAs is "unnecessary" to advance competition or diversity when a particular rule otherwise calls for an examination of "voices."[56] The FCC's

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[54] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). *See Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *cert. denied,* 506 U.S. 816 (1992). *See also Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). Even a statute, the validity of which depends on a premise supported at the time of enactment, becomes invalid subsequently if the predicate disappears. *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979).

[55] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 1007 (1971), 403 U.S. 923 (1971), 406 U.S. 950 (1972).

[56] *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, Report and Order, 14 FCC Rcd 12903, 12949 (1999) ("*1999 Local Television Order*"), *recon.* 16 FCC Rcd 1067 (2000), *aff'd in part and*

initial liberalization of that rule had permitted, on a presumptive basis, mergers involving one TV, one AM, and one FM station in the Top 25 television markets, if post-merger at least 30 independently owned broadcast "voices" remained.[57] In 1999, the FCC removed the reference to market size, expressing concerns about its accuracy in accounting for levels of diversity and ability to reflect change.[58] Thus, even when local ownership regulation is warranted, line-drawing based on DMA rank is not.[59]

Further, data in the record on newspaper failures compelled relief outside the Top 20 markets. Prior to adoption of the *2008 Decision*, the Chairman had noted that at least 300 daily newspapers had ceased publication in the last 30 years.[60] More detailed data submitted in the

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remanded in part sub. nom., *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*").

[57] *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, Second Report and Order, 4 FCC Rcd 1741 (1989). In 1996, Congress extended the presumption to the Top 50 markets. Pub. L. No. 104-104, § 202(d), 110 Stat. 56, 112 (1996), as amended by Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

[58] The FCC explained its decision as follows:

> [A] rule based on the number of independent voices more accurately reflects the actual level of diversity and competition in the market . . . . [A] market-size restriction is unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners, and a minimum number of alternative outlets available to advertisers . . . . In addition, unlike a rule based on market rank, our revised rule will account for changes in the number of voices in a market resulting from consolidation, the addition of new voices, or the loss of any outlets.

1999 Local Television Order, 14 FCC Rcd at 12949 (footnotes omitted).

[59] For different reasons, the FCC in 1982 repealed its "Top 50" policy, which had required an evidentiary hearing for those seeking to acquire additional VHF stations in the largest markets unless the applicant made a compelling public interest showing. The decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit. *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982). With repeal of the Top 50 policy and removal of DMA rank from the radio/television cross-ownership rule, the FCC's ownership rules, prior to the *2008 Decision*, had no longer been based on arbitrary references to DMA rank.

[60] FCC News Release, "Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule," DOC-278113A1 (rel. Nov. 13, 2007) at 1.

record showed, however, that the majority of recent newspaper failures have occurred outside the Top 20 markets. For the period 1988 to 2006, of the 88 newspapers that completely ceased publication, 52 or roughly 60 percent were outside the Top 20 markets.[61] Additional data similarly demonstrated that, from 1976 to 2006, the overwhelming number of newspaper failures had occurred in very small population centers. In small towns of less than 25,000 residents, 179 papers went out of existence during those three decades, whereas population centers with over one million residents actually gained four papers; the record also showed all population tiers with less than one million residents lost newspapers during the period.[62] In light of this evidence, restricting presumptive relief to just the Top 20 DMAs was highly arbitrary.[63]

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[61] Data derived from the following: *Editor & Publisher International Yearbook 1989* at I-367; *Editor & Publisher International Yearbook 1990* at I-370; *Editor & Publisher International Yearbook 1991* at I-380; *Editor & Publisher International Yearbook 1992* at I-382; *Editor & Publisher International Yearbook 1993* at I-423; *Editor & Publisher International Yearbook 1994* at I-449; *Editor & Publisher International Yearbook 1995* at I-451; *Editor & Publisher International Yearbook 1996* at xxiv; *Editor & Publisher International Yearbook 1997* at xxiv; *Editor & Publisher International Yearbook 1998* at xxiv; *Editor & Publisher International Yearbook 1999* at xxiv; *Editor & Publisher International Yearbook 2000* at xxiv; *Editor & Publisher International Yearbook 2001* at xx; *Editor & Publisher International Yearbook 2002* at xx; *Editor & Publisher International Yearbook 2003* at xx; *Editor & Publisher International Yearbook 2004* at I-493; *Editor & Publisher International Yearbook 2005* at 490-I; *Editor & Publisher International Yearbook 2006* at I-455; *Editor & Publisher International Yearbook 2007* at I-445; *Broadcasting & Cable Yearbook 2007* at B-132 to B-215. This figure on newspaper failures did not include newspapers that cut back by converting from daily to weekly publication, merged with another newspaper, or became a "zoned edition" of another nearby newspaper; there is no reason to think that those curtailments would be any less prevalent in smaller markets.

[62] *MG Dec. 11, 2007 Comments* at Appendix I.

[63] Presumably ignoring this evidence in the record and in the *2008 Decision*, *see, e.g.*, at ¶¶ 27-33, that newspapers are facing adverse financial conditions, Objectors ask the FCC to make an even more regulatory change to the cross-ownership regime. In the *Petition*, at 6-7, they propose that television owners that purchase a local newspaper be required to submit a waiver request within one month of the acquisition and that the FCC act on the filing expeditiously. If the applicant cannot show that the acquisition serves the public interest, Objectors contend that the FCC should order the applicant to comply with the cross-ownership rule within one year. Objectors have provided no legal or credible factual support for this proposal, only anecdotal incidents that again play to their predilections. If, indeed, the FCC thinks such a significant change is needed to regulate newspaper acquisitions -- an area in which its jurisdiction is most, most tenuous -- it should put the proposal out for comment.

Third, use of the "eight-voices" limit in the presumptive waiver test is reminiscent of a formulation of the FCC's duopoly rule roundly discredited by the United States Court of Appeals for the District of Columbia in 2002 as arbitrary and capricious and remanded for corrections that the FCC has never made effective.[64] The *2008 Decision*'s approach to presumptive waivers does not correct these problems; it, in fact, compounds them.

The *2008 Decision* first borrows a Top 4 criterion from the duopoly rule, requiring that the television station that is to be cross-owned with a newspaper not be among the Top 4 ranked stations in its market. In the duopoly context, adoption of this Top 4 prong was based on promoting competition; the FCC reasoned that allowing merger of two of the Top 4 stations with their larger advertising bases might be anti-competitive.[65] As noted above, however, both the FCC and Third Circuit have recognized that newspapers and broadcast stations operate in separate product markets for antitrust analysis, and competitive concerns are no longer at issue in the newspaper/broadcast cross-ownership rule.

The *2008 Decision* also borrows the duopoly rule's requirement that eight independently owned and operating "major media voices" remain post-merger, limiting the count to television stations and newspapers. As the D.C. Circuit found in *Sinclair*, however, this approach arbitrarily and capriciously excludes other "voices." In that case, the court ruled that the duopoly rule was fatally flawed because of the FCC's unjustified failure to include the types of "voices" that it had found appropriate for inclusion in its simultaneous revision of the radio/television cross-ownership rule -- full-power commercial and noncommercial television, commercial and noncommercial radio, daily newspapers, and cable. The court found the difference in approach between the duopoly rule and the radio/television cross-ownership rule unacceptable: "Having found for purposes of cross-ownership that counting other media voices 'more accurately reflects

[64] *Sinclair*, 284 F.3d at 152, 169.

[65] *1999 Local Television Order*, 14 FCC Rcd at 12933-34.

the actual level of diversity and competition in the market' . . . the Commission never explains why such diversity and competition should not also be reflected in its definition of 'voices' for the local [television] ownership rule."[66] The court held that the FCC had "failed to demonstrate that its exclusion of non-broadcast media from the eight voices exception is 'necessary in the public interest' under § 202(h) of the 1996 Act."[67] In this instance, the failure is even more pronounced. The newspaper/television cross-ownership directly deals with cross-ownership as did the radio/television cross-ownership rule that the *Sinclair* court used as a guide. The comparison and need for uniformity is even more direct than it was in the duopoly context.

Fourth, retention of any restriction on newspaper/broadcast cross-ownership is simply unconstitutional. The sole justification for deferential First Amendment review of the cross-ownership rule in 1978 -- the "scarcity doctrine" -- has been rendered obsolete by regulatory and technical changes.[68] In addition, since 1978 Congress has acted to limit the Commission's role in awarding new spectrum to broadcast licensees, further eliminating any principled basis for the "scarcity doctrine." Not eligible for deferential review, any newspaper/broadcast cross-ownership restriction cannot survive heightened constitutional scrutiny. In addition, any such restriction can no longer survive equal protection scrutiny because newspapers are the *only* non-broadcast media that remain subject to discriminatory cross-ownership restrictions.

V. CONCLUSION

Insofar as the *Petition* pertains to the permanent waivers that grandfathered the Media General cross-ownerships, it should be dismissed as untimely. The FCC does not have authority to entertain it. If the FCC somehow finds a reason to overlook this fatal deficiency, it should

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[66] *Sinclair*, 284 F.3d at 164.

[67] *Id.* at 165.

[68] *See, e.g.*, John W. Berresford, *The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, Media Bureau Staff Research Paper (March 2005).

deny the *Petition* because the FCC's analytic approach to the adjudicatory grandfathering decision was consistent with its own and court precedent. The result was also supported by ample factual evidence in the record. In addition, the FCC should reject Objectors' attacks on other aspects of the *2008 Decision* dealing with the newspaper/broadcast cross-ownership rule, a restriction that the FCC should have eliminated entirely since retaining it violates statutory standards and constitutional principles.

Respectfully submitted,

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know there are diverse views on this issue. We will try to work out an orderly procedure so that Members will be able to get their views out and considered in the Senate and do it in a timely way.

Again, I thank the two leaders and the Senator from Wyoming as well for his cooperation, as always.

The PRESIDING OFFICER. The majority leader is recognized.

UNANIMOUS CONSENT AGREEMENT—S.J. RES. 28

Mr. REID. Mr. President, I ask unanimous consent that, upon disposition of the House message on S. Con. Res. 70, the Senate proceed to the consideration of Calendar No. 731, S.J. Res. 28, a joint resolution disapproving the rule submitted by the FCC with respect to broadcast media ownership, the statutory time be reduced to 2 minutes equally divided and controlled between Senators DORGAN and STEVENS or their designees; that upon the use or yielding back of the time, the Senate proceed to vote on passage of the joint resolution; provided further that all remaining provisions of the statute remain in effect. I further ask that all statements relating to the matter be printed in the RECORD prior to the vote on this important piece of legislation.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. REID. Finally, as I understand, we have one more rollcall vote we are going to have now. There will be no votes tomorrow. This will be the last vote until Tuesday morning, unless someone has an objection.

The PRESIDING OFFICER. There is now 2 minutes equally divided prior to vote on a motion offered by the Senator from New Hampshire, Mr. GREGG, on discretionary spending.

The Senator from North Dakota.

Mr. CONRAD. Mr. President, under the budget resolution, spending goes down each and every year as a share of domestic product, 20.8 percent down to 19.1 percent

The Senator opposite seeks to make those reductions more steep and embrace the President's proposal which would eliminate the COPS Program—not just cut it but eliminate it, a program that puts 100,000 police on the street—cut the Weatherization Assistance Program 100 percent at a time of $120 oil; cut the first responder grants—police, fire, emergency medical 78 percent; cut community development 24 percent; cut clean water 21 percent; cut LIHEAP 15 percent.

More than that, because of the way this amendment has been written, this would put defense in the pool to be cut. If you want to do that, vote for the Senator's motion. I urge a "no" vote.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. GREGG. Mr. President, I have no charts. I simply have a number: $1 trillion. We should draw the line somewhere around here. We should say to the American people: It is time that we exercise fiscal discipline. Let's do it at $1 trillion. That means that in this budget, you only have to reduce it 1 percent to get back underneath that number.

We don't have to look to the President to do that. We can't, amongst ourselves, come up with $10 billion of savings on a $1 trillion budget? If we can't, we should all go home.

Vote to draw the line at $1 trillion. Vote for the American taxpayer.

Mr. President, I yield back my time.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from New Hampshire, Mr. GREGG.

Mr. GREGG. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from New York (Mrs. CLINTON) and the Senator from Illinois (Mr. OBAMA) are necessarily absent.

Mr. KYL. The following Senators are necessarily absent: the Senator from Tennessee (Mr. ALEXANDER), the Senator from Tennessee (Mr. CORKER), and the Senator from Arizona (Mr. MCCAIN).

Further, if present and voting, the Senator from Tennessee (Mr. ALEXANDER) would have voted "yea."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 47, nays 48, as follows:

[Rollcall Vote No. 135 Leg.]

YEAS—47

Allard	DeMint	Lugar
Barrasso	Dole	Martinez
Bayh	Domenici	McConnell
Bennett	Ensign	Murkowski
Bond	Enzi	Roberts
Brownback	Feingold	Sessions
Bunning	Graham	Shelby
Burr	Grassley	Smith
Cantwell	Gregg	Stevens
Chambliss	Hagel	Sununu
Coburn	Hatch	Thune
Cochran	Hutchison	Vitter
Coleman	Inhofe	Voinovich
Cornyn	Isakson	Warner
Craig	Klobuchar	Wicker
Crapo	Kyl	

NAYS—48

Akaka	Harkin	Nelson (FL)
Baucus	Inouye	Nelson (NE)
Biden	Johnson	Pryor
Bingaman	Kennedy	Reed
Boxer	Kerry	Reid
Brown	Kohl	Rockefeller
Byrd	Landrieu	Salazar
Cardin	Lautenberg	Sanders
Carper	Leahy	Schumer
Casey	Levin	Snowe
Collins	Lieberman	Specter
Conrad	Lincoln	Stabenow
Dodd	McCaskill	Tester
Dorgan	Menendez	Webb
Durbin	Mikulski	Whitehouse
Feinstein	Murray	Wyden

NOT VOTING—5

Alexander	Corker	Obama
Clinton	McCain	

The motion was rejected.

Mr. CONRAD. Mr. President, I move to reconsider the vote.

Mr. BAUCUS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Under the previous order, the Chair appoints Mr. CONRAD, Mrs. MURRAY, Mr. WYDEN, Mr. GREGG, and Mr. DOMENICI conferees on the part of the Senate.

DISAPPROVAL OF FCC OWNERSHIP RULE SUBMITTAL

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of S.J. Res. 28, which the clerk will report.

The legislative clerk read as follows:

A resolution (S.J. Res. 28) disapproving the rules submitted by the Federal Communications Commission with respect to broadcast media donorship.

The PRESIDING OFFICER. There is 2 minutes equally divided. The Senator from North Dakota is recognized.

Mr. DORGAN. This is a resolution of disapproval of an FCC rule dealing with media ownership. The Commerce Committee has passed this out to the floor of the Senate. I will not go into great length on the merits of the issue except to say we have visited this issue previously. I think there is too much concentration in the media. The FCC rule moves in exactly the wrong direction, adding more concentration.

I ask that Members of the Senate who wish to would be able to make statements that appear prior to this vote. I believe we have agreed to a voice vote.

I yield the floor. I reserve my time.

The PRESIDING OFFICER. The Senator from Alaska is recognized.

Mr. STEVENS. I yield to the Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I know we are going to have a voice vote. I ask unanimous consent I be recorded as a "no."

The PRESIDING OFFICER. The record will so reflect.

Mr. ISAKSON. Mr. President, I wish the record also to reflect I voted "no" on S.J. Res. 28.

Mr. STEVENS. I ask unanimous consent statements in opposition to the resolution of the Senator from North Dakota be printed in the RECORD at this point.

The PRESIDING OFFICER. Without objection, it is so ordered.

CROSS OWNERSHIP RULE

Mr. WEBB. Mr. President, I rise today to thank my colleague from North Dakota for his work on media ownership issues and to engage him in a colloquy to clarify one point about the resolution of disapproval. I note that Senator DORGAN has long been a champion of media localism and diversity, issues that are quite important to me as well.

Because I believe that the Federal Communications Commission ignored Congress's repeated admonitions about following appropriate processes in reaching the agency's new cross-ownership rules, I support this bipartisan resolution.

Yet I believe that if the Senate adopts this resolution, the existing waivers contemplated under the FCC cross-ownership rule should be protected. This means that those waivers would not be a part of this resolution.

I have significant concerns that if these waivers are not protected, this legislation could harm some media markets and constituents' access to news and information in my State of Virginia.

I would like to confirm that this resolution, while it would nullify the revised version of the FCC's newspaper cross-ownership ban, would not undo or in any manner change the FCC's decision to grant permanent waivers to five existing newspaper-broadcast combinations, and thus grandfather them, as set forth in paragraphs 77 and 158 of the FCC's December 18, 2007 Report and Order. It is my understanding that this resolution will not affect these five specific waivers, and I would like to clarify this understanding

Senator DORGAN, is it your goal and understanding that the waivers that the FCC granted in conjunction with the cross-ownership rule be protected?

Mr. DORGAN. Under the Congressional Review Act, the resolution of disapproval is intended to overturn a specific rule, not other parts of an agency's order. The waivers are not rules.

The resolution is written in a specific way referring to an order, but it is the rule that is nullified. These waivers could have been granted alone or under the previous cross-ownership ban. It is not the intention of this resolution to affect the waivers in the order.

~~Ms. SNOWE. Mr. President, I rise~~ today in strong support of the resolution of disapproval that repeals the recent Federal Communications Commission's media ownership rulemaking.

As an original cosponsor of this measure, I applaud Senator DORGAN for once again taking the lead in introducing critical legislation to overturn a misguided attempt by the commission to relax crucial media ownership rules—a move that will only lead to further consolidation within the industry that will ultimately harm consumers.

As my colleagues are well aware, consolidation in the media market has led to fewer locally owned stations, and less local programming and content. Indeed, it speaks volumes that the number of independent radio owners has plunged in the past 11 years by 39 percent.

Just in 1996 and 1997 alone, more than 4,400 radio stations were sold following the first round of consolidation following passage of The Telecommunications Act of 1996. Between 1995 and 2003, ownership of the top 10 largest television stations increased from 104 owners to 299 owners.

At the same time, we know that locally owned stations aired more local news and programming than non-locally owned stations—and that is not just me talking. That is according to the FCC's own studies, which also found that smaller station groups overall tended to produce higher quality newscasts compared to stations owned by larger companies.

So there should be no mistake—fewer independent, local stations mean less local content and programming.

Minority and women-ownership of media outlets are also at perilously low levels—currently only 6 percent of full-power commercial broadcast radio stations are owned by women and 7.7 percent are owned by minorities. Ownership of broadcast television is even lower—5 percent for women and only 3.3 percent for minorities. Instead of being a catalyst promoting localism and ownership diversity, the FCC's action will actually hasten the decline in these crucial areas.

The Senate Committee on Commerce, Science, and Transportation last fall held a hearing to consider these very issues, and the actions required for improvement. During that hearing, I and several of my colleagues voiced strong concern about Chairman Martin's intent to ease current media ownership rules, particularly because of the potential impact on localism and diversity in broadcasting.

That is why I, along with many committee members, joined Senators DORGAN and LOTT in introducing The Media Ownership Act of 2007, which was reported out of the committee favorably in December. This constitutes yet another step in the mounting opposition to the loosening of these crucial rules. We had hoped that Chairman Martin would heed not only our urgings, but the concerns expressed by the American public, and complete the 4-year-old rulemaking on localism.

However, on November 13, less than a week after that hearing, the Chairman issued a new proposal to lift the 32-year-old newspaper-broadcast cross-ownership ban in the top 20 media markets. Worse still, the FCC allowed only 28 days for the public to comment on the proposal when it has historically provided 60 to 90 days on pivotal matters such as this.

Clearly, the FCC's actions demonstrate a litany of highly-misguided priorities that neglect to consider the full impact of the FCC's rule change on the American people. Therefore, this resolution of disapproval is necessary to rescind this haphazard approach.

I must say it feels a little like déjà vu all over again, when nearly 5 years ago the FCC attempted a similar effort to relax another set of media ownership rules. And fittingly, the opposition to the commission's attempt then mirrors the opposition that is coalescing now. And the action we are considering now is reminiscent of the joint resolution passed by the U.S. Senate in September 2003, which I cosponsored, condemning the Commission's efforts to rewrite those rules.

So that naturally begs the question—why would the commission continue to attempt to weaken media ownership rules when the American public has vociferously opposed these efforts time and again? When the U.S. Congress in 2004 enacted a statute prohibiting the FCC from raising national ownership limits above 39 percent? When the Third Circuit Court of Appeals rejected as arbitrary and capricious this attempt at revising the rules after finding the FCC had no factual basis for the limits it set? We deserve an answer.

Many proponents for relaxing media ownership rules have pointed to the precipitous decline of the newspaper industry as the reason change is mandatory. They have even cited a recent report by the Newspaper Association of America, NAA, which found print ad revenue for the industry fell by 9.4 percent last year—the biggest decline since it started keeping records in 1950.

However, what these proponents are neglecting to mention is that the NAA also found that online newspaper advertising revenue increased 19 percent last year.

Furthermore the NAA president and CEO John Sturm stated "newspaper publishers are continuing to drive strong revenue growth from their increasingly robust Web platforms." This hardly sounds like an industry in irreversible peril if this longstanding rule remains in place.

Opponents of this resolution will also argue that the FCC crafted a very narrow revision, lifting the cross-ownership ban for only the top 20 media markets, so this resolution is unnecessary. However, the FCC also adopted "four factors" and two broad "special circumstances" that would allow this ban to be lifted for a station in any media market.

These scenarios and factors include evaluating financial condition, possible increased local news, as well as existing market media concentration, and news independency. Given the vagueness and loopholes that exist with the rulemaking, the "high hurdle" that the Commission has supposedly set for proposed combinations could be easily cleared by using only a stepladder.

Preventing further media consolidation has been a bipartisan effort, and the resolution before us today is no different. We must not allow the indispensable role the media plays in promoting diversity and localism to be further marginalized and miniaturized by unchecked consolidation within the industry.

We owe it to the American people to restore confidence in the FCC's commitment not only to uphold the public interest but to advance it and strengthen it. That is why it is undeniably incumbent upon the commission members to revisit these rules and establish a set of standards that will effectively promote localism and minority and women-ownership, not more media consolidation. I urge my colleagues to support this resolution.

Mr. MENENDEZ. Mr. President, today we are considering a critical

Friday, April 16, 2010 |
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:::: A series on the conflicts over Southwest Virginia's natural gas wealth ::::

By Daniel Gilbert

Beneath the surface of seven Southwest Virginia counties lie pools of natural gas worth more than a billion dollars a year. Some of this gas belongs to landowners forced by the state to lease their mineral rights to private energy corporations to develop. But instead of putting royalties into the pockets of mineral owners, the state funnels thousands of dollars every month into an escrow fund that royalty owners cannot monitor or access without clearing enormous legal hurdles.

While the system has vastly expanded production of

Articles in this series

natural gas in Virginia, it has devoted scant resources to ensuring that companies make the required payments into escrow, which in recent years has ballooned to more than $24 million. The result is that companies can produce gas for years without ever filing the necessary paperwork for royalties to be escrowed, and virtually no one notices that hundreds of individual accounts in escrow each month receive no deposits even though the corresponding gas wells are producing gas, a *Bristol Herald Courier* investigation finds.

Search our Database for information on escrow accounts, with balances each month, current to October 2009.

Unit ID

Operator

VGOB ID

Accounting Period

Search

Created with Caspio

**Please note that you must choose an accounting period for each search. If you wish to see the details of an account, please click on the account name from the secondary search results. Online database created by Heather Provencher | TriCities.com*

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Overdue royalty payments continue; some accounts missing

(3/28/10)

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Do I have money in escrow? How to use our database and determine if you may have money in escrow.

View the members of and contact information for the Virginia Gas and Oil Board

Graphics:

Hydraulic Fracturing

The Corporate Players

How Forced Pooling works

Money made from Southwest Va. gas wells isn't reaching people it should

David Crigger | Bristol Herald Courier

A pump pulls gas from a well in Southwest Virginia

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FOR MORE INFORMATION, including a database of accounts associated with wells, click here.

By Daniel Gilbert | Reporter / Bristol Herald Courier
Published: December 6, 2009
Updated: December 20, 2009

Every month, a bank in Roanoke receives checks for thousands of dollars belonging to people who might never cash them.

The checks are royalty payments for people whose mineral rights the state of Virginia has leased – against their will or without their knowledge – to private energy corporations. These payments represent the financial crumbs of natural gas production in Southwest Virginia – a multibillion-dollar industry that in 2008 produced enough gas every second to heat the average home for 16 days.

But instead of reaching the pockets of mineral owners, the money is funneled into an opaque state-run escrow fund, where it has accumulated with scant oversight for nearly 20 years. As of October, the fund held more than $24 million – and that isn't everything it should hold.

An untold number of people in the region, throughout the state and across the country have a claim to this money through their ancestors' deeds. Some are entitled to hundreds of thousands; others just pennies. But they are linked by this common dilemma: They receive no accounting of their royalties in escrow, and they face enormous legal barriers in collecting them.

The escrow fund is an obscure, untidy legacy of state lawmakers' determination to develop Virginia's most abundant gas, coalbed methane, without tackling the thorny question of who owns it. In passing the 1990 Virginia Gas and Oil Act, the legislature created a kind of eminent domain, known as forced pooling, that authorizes gas companies to produce gas belonging to others and to pay royalties into escrow when they cannot find mineral owners or if the gas ownership is in dispute.

But the state has done little to monitor the gas industry's compliance, and the billion-dollar energy conglomerates don't always make the required payments into escrow. Of about 750 active individual accounts in escrow, between 22 percent and 55 percent received no royalty payments during months when the corresponding wells produced gas over an 18-month period, a *Bristol Herald Courier* investigation has found.

The job of regulating the industry officially belongs to the Virginia Gas and Oil Board, a governor-appointed body that meets monthly in Lebanon, Va., and whose seven members serve six-year terms and receive $50 a hearing. The board is composed of a retired college professor, two college administrators, a former cattle farmer, a representative of the coal industry, a representative of the gas and oil industry, and a state energy official from the Department of Mines, Minerals and Energy who acts as board chairman.

But the real work of ensuring that gas companies follow through with payments into escrow, fielding inquiries from mineral owners about the royalties they cannot see, and sorting out mind-numbingly complex ownership questions for close to 1,000 separate production units falls to just two employees of the Division of Gas and Oil.

That level of staffing, combined with the lack of any audits or compliance checks in the DGO's data-collection systems, means that gas operators are essentially on the honor system. The DMME, the DGO's parent agency, has acknowledged discrepancies between production and escrow deposits and vows it is taking steps to fix the problems and improve its ability to chart compliance.

The two corporations that dominate natural gas production in Virginia don't deny they've made mistakes, but they credit any missing royalty payments to accidental oversights and the complexity of mineral ownership in Southwest Virginia.

The escrow account
There are two primary scenarios that require gas companies to escrow royalties. The first arises when the well operator cannot locate mineral owners entitled to a share of production and then successfully petitions the board to lease those owners' rights.

The second scenario kicks in when different people own the coal and the gas for the same tract of land – a common occurrence in Southwest Virginia, where many landowners sold the coal beneath their surface a century ago. Splitting a mineral estate like this has created a conflict between the coal owner and the gas owner over who is entitled to royalties from coalbed methane – a gas developed by fracturing and stimulating the coal seam that accounted for 80 percent of all gas produced in Virginia in 2008.

The DGO in June estimated that 83 percent of royalties held in escrow belongs to owners in dispute over coalbed methane ownership.

The legal conflict over coalbed methane reached the state Supreme Court in 2004, when justices unanimously upheld a lower court ruling that a gas owner who sold only coal retained full rights to coalbed methane. But that hasn't made it easier for other gas owners to retrieve their royalties from escrow.

To do this, state law requires a gas owner to sue to prove ownership, or agree to split royalties with a coal owner – generally a corporation. These requirements effectively force mineral owners to give up a portion of their royalties, either to an attorney or to a coal company, and the process can drag on for years.

Until one of those two conditions is met, gas well operators are required to deposit royalty payments into escrow, where the supporting documentation – including gas volume, sale price and any deductions taken out of the royalty – is sent to a bank branch in Roanoke, electronically imaged, archived and virtually never examined.

Some of the time, the escrow fund works as intended and disburses checks to royalty owners who have a court order or a split agreement. Most of the time, it functions like the banking equivalent of an oubliette – a money prison where royalties languish until they are presumed abandoned. Since the Virginia high court's ruling in 2004, the value of the escrow fund has tripled, state records show.

Wachovia Bank, now part of Wells Fargo, manages the escrow fund and generates monthly reports that list the deposits, interest and balance for some 950 individual sub-accounts, active and inactive. Each sub-account corresponds to one or more wells that are producing gas that belongs to owners who are unknown or whose ownership is in dispute.

In such a case, any gas that a well produces should generate a royalty payment into escrow.

Discrepancies
The *Herald Courier* compared gas corporations' deposits into escrow with production numbers they reported for the corresponding wells between January 2008 and June 2009 – a period that included historically high prices for natural gas. The analysis revealed:

- On average, 30 percent of sub-accounts in escrow each month received no royalty payments even though they corresponded to wells producing gas.

- For 10 of the 18 months, 190 sub-accounts received no deposits even though the corresponding wells produced gas.

- For all 18 months, 94 sub-accounts received no deposits even though the corresponding wells produced gas.

- Gas operators sometimes failed to submit the necessary paperwork for royalties to be escrowed, meaning that some wells have produced for years and no royalties have been deposited into escrow, creating the false impression that they are inactive.

- The escrow fund is rife with accounting and administrative errors, including duplicate sub-accounts, overpayments and inactive accounts that should have been closed out.

Some of the production and escrow discrepancies could be explained by changes in the status of a well, such as when a coalbed methane well becomes part of a larger unit and a separate account is created to receive royalties. Other missing payments are the result of "clerical errors," according to officials with the Division of Gas and Oil and for gas corporations.

"There have been mistakes, as far as things slipping through the cracks," acknowledged a senior executive for EQT Corp., the Pittsburgh-based corporate parent of Equitable Production Co.

Partly to blame was a computer glitch that held payments in suspense until they reached a $50 threshold, said Kevin West, EQT's managing director of external affairs.

"We're not making any excuses," West said, adding that EQT will deposit outstanding royalties into the state escrow fund with interest. "In this case, a mistake was made, and we're glad it was pointed out so that we could get it fixed."

Officials for CNX Gas Co., a subsidiary of Canonsburg, Penn.-based Consol Energy, refused to get into a "well-by-well discussion."

"Each well and each unit has its own set of characteristics, and without going into the history on each well, I think it's impossible to portray an accurate picture of what happened in a particular well," said Cathy St. Clair, a CNX spokeswoman.

She added, "I don't think you can infer that because a well had no deposits that deposits should have been made."

In response to the *Herald Courier*'s analysis, the Department of Mines, Minerals and Energy issued a statement that it has "been aware of the discrepancies between reported production and deposits to the escrow account" and "has taken a number of steps to fix the problems. Your questions have been addressed to DMME in the middle of this work."

The agency also acknowledged that companies have failed to file the required paperwork for royalties to be escrowed – a misdemeanor offense that is punishable by a $10,000 fine for every day of the violation, according to state law. In a case where the paperwork is four years late – the *Herald Courier* identified several – the DMME could impose a fine of $14.6 million per case.

It is unclear whether the agency will impose any fines. Queried about enforcement, a DMME spokesman wrote that the agency will only pursue civil penalties "in cases where we raise such issues with the operator, if the operator fails to be responsive."

The reaction of board members – those actually in charge of administering the escrow fund, with ultimate authority over how to enforce state regulations – ranged from concern to disinterest; some did not respond to requests for comment, or refused to do so.

"Any appearance of wrongdoing or alleged discrepancy regarding the escrow account should be investigated by the Virginia Gas and Oil Board," Katie Dye, a public member from Buchanan County, e-mailed the newspaper.

When presented with the *Herald Courier*'s findings, Bruce Prather, the board member who represents the gas and oil industry, referred a reporter to the Division of Gas and Oil.

"We don't generate our own business on that board. It's brought before us," he said.

Asked if the discrepancies concerned him, Prather said, "I've heard of this in the past," and suggested that a court would be a more appropriate venue to address the irregularities.

"That is where something like this ultimately is going to end up," he said.

Coming Monday: *Jamie Hale thought he had a choice about whether to lease his gas to an energy corporation. He was wrong.*

dgilbert@bristolnews.com | (276) 645-2558

Reader Reactions

Voice your opinion by posting a comment.
Flag Comment Posted by capttrips25 on December 07, 2009 at 8:43 am

For generations the people of SWVA have toiled for table scraps and provided valuable resources for OTHERS.

While the rest of Virginia prospers and grows we become more impoverished.

This is nothing short of economic rape. Where is OUR reparations for the abuse and theft sanctioned by the state? When will WE see that which is rightfully ours?

My family has lived here longer than the United States has existed. Family cemeteries that are full of history and American patriots are being moved by evil corporations so they can blast away the mountain and hallowed resting places of our ancestors to get to the coal below them.

Damn these evil people who desecrate and destroy our home and birthright and walk away leaving nothing but poverty!

END THE RAPE OF APPALACHIA NOW!

Flag Comment Posted by heydude on December 06, 2009 at 9:44 pm

There alot of people that have not heard a thing from these gas companys, who will help them?

Flag Comment Posted by tmullins on December 06, 2009 at 3:08 pm

Yet another tale of 3rd world Appalachia’s progress and prosperity. Politician’s and Profit Machines come ahead of people.

http://www.wisecountyissues.com

Flag Comment Posted by abdgranny on December 06, 2009 at 2:26 pm

Maybe while the paper is investigating the gas companies this well, maybe they want to check out Appalachian Power. It’s been my experience that they do the land owners the same way. Different case, same results. It’s all money that the big companies can keep,if no one questions them.

Flag Comment Posted by BP on December 06, 2009 at 1:54 pm

As a retired senior editor of major eastern newspapers, I have watched with dismay the decline in the quality of journalism in this country. I had begun to fear that superb work like this series had vanished forever. Keep up the good work. You’ve renewed an Old Pro’s faith in good newspapering.

Flag Comment Posted by lswark on December 06, 2009 at 1:44 pm

Talk about David and Goliath: Daniel Gilbert and this newspaper have taken on a multibillion-dollar industry and state government agencies that have run roughshod over individuals’ rights for decades.

Now it’s time for public officials to confront and resolve this issue of ownership, get this $24 million out of escrow and to its rightful owners—the landowners of SW Virginia, their descendants and heirs.

Congratulations!

Lois Sutherland Wark
Las Cruces, New Mexico

Page 1 of 1

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Friday, April 16, 2010 |
Bristol, VA 73° Feels Like: 73° ClearView Warnings/Advisories
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Siphoning natural gas profits from under the feet of landowners

David Crigger/Bristol Herald Courier

Jamie Hale looks over a ridge to his property in Buchanan County, Va. Several gas wells boarder his property and draw the gas from under his feet.

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REPORT:The 1990 Virginia Coal and Energy Commission

FOR MORE INFORMATION, including a database of accounts associated with wells, click here.

By Daniel Gilbert | Reporter / Bristol Herald Courier
Published: December 7, 2009

Updated: December 7, 2009

PART TWO OF AN EIGHT PART SERIES

The low hiss from a rusty pipeline is the sound of an energy corporation sucking coalbed methane from beneath Jamie Hale’s property.

On a hot August day, the gas is flowing out of the well at the rate of 1.2 cubic feet per second – producing in one day enough gas to satisfy the heating and cooking needs of the average American home for more than a year. The well – one of seven that surround Hale’s 40-acre property in Buchanan County, Va. – coaxes the colorless, odorless gas to the surface by pumping water and sand at high pressure into the coal seam.

As the gas reaches the surface, it is shunted into a small pipeline, whisked off to a treatment facility, prepped for passage on an interstate pipeline to be sold to a utility provider, and ultimately delivered to homes and businesses in Virginia and other states.

The company draining Hale’s coalbed methane is CNX Gas, a subsidiary of Pittsburgh-based Consol Energy and the largest gas producer in Virginia. In 2008, CNX operated 3,000 wells in Southwest Virginia and raked in gross income of $4.65 billion from its national operations.

Hale, 37, drives trucks and operates a silo at a power plant in Buchanan County, the largest gas-producing county in the state. His wife is a teacher’s aide, and they have a daughter in high school.

The Hales are entitled to a share of the proceeds from their gas, but since the wells rimming the family land began producing in 1998, they have not received a penny.

Instead, CNX cuts a check for the royalties it owes the Hales – and countless others whose gas it produces – and transmits the money into a state-run escrow account that landowners cannot monitor or access without clearing enormous legal and administrative hurdles.

Hale himself triggered this scenario by refusing to lease his gas to CNX, unaware that Virginia did not give him that choice.

“I didn’t realize they could take your gas without a lease,” he said.

“A shot in the arm”

In 1990, the Virginia legislature resolved that it could not allow stubborn individuals to hamper the development of coalbed methane – an abundant resource whose peculiar characteristics had prevented it from being commercially produced. Up to this point, state law provided that surface owners like Hale owned all the migratory gases beneath the surface of their land, unless they had previously sold the rights to their gas.

This statute had been unpopular with gas corporations eager to exploit the coalbed gas; they feared that doing so could trigger civil penalties for taking gas owners' property, according to a 1990 report by the Virginia Coal and Energy Commission.

The question of coalbed methane ownership is particularly nettlesome in Southwest Virginia, where many landowners sold the coal from beneath their land but retained gas rights. Splitting the mineral estate has created a conflict between the gas owner and the coal owner, each of whom lay claim to a gas that is produced by fracturing and stimulating the coal seam.

Further complicating the ownership question is that at the time most landowners sold their coal, no one knew that coalbed methane – long known as "miner's curse" for its lethally explosive properties – would turn out to be a valuable commodity.

The General Assembly in 1990 was in a mood to stimulate development, and it had a reason to act quickly. A federal tax credit for alternative fuels was expiring at the end of the year, and industry lobbyists argued that corporations could not profitably develop coalbed methane without the benefit of the tax credit.

"The production of this gas represents a potential 'shot in the arm' to the economy of Southwest Virginia," the commission wrote in its 1990 report to the General Assembly.

The legislature devised a way to develop the commonwealth's coalbed methane resources while skirting the thorny question of ownership. The 1990 Gas and Oil Act created one regulatory body, the Virginia Gas and Oil Board, which would apply a loose grid over the gas fields and create square units of generally 60 to 80 acres for coalbed methane wells. Whenever different people owned the gas and the coal for a single tract of land, gas operators would be required to escrow royalties according to the owners' interest in the unit until they reached an agreement or a court determined ownership.

This seemingly elegant solution paved the way for a massive expansion of coalbed methane production in the state's most economically depressed region. But the 1990 law has another kind of legacy, too.

By requiring a royalty owner to sue for ownership or split proceeds with a conflicting claimant, the law set up an asymmetrical, David-versus-Goliath type of legal conflict that pits an individual owner against an energy conglomerate.

If Jamie Hale wants to retrieve his coalbed methane royalties from escrow, he'll have to sue the coal company that owns the coal beneath his 40 acres. Or he'll have to give up some of his royalties to the corporation.

Neither option looks good to Hale.

"They just came in here and started taking our gas, and there's nothing that a poor man can do about that, honestly," he said. "I may never get nothing."

And Hale is several steps ahead of many mineral owners: He knows what he owns.

"We do not have an inkling"

Theresa Brents lives in Stuarts Draft, Va., some 250 miles from the two large tracts of land she inherited from her grandparents in Buchanan County.

About 12 or 13 years ago, Brents agreed to lease her mineral rights beneath 150 acres to CNX Gas. She’s never received a royalty payment and had never heard of the Virginia Gas and Oil Board’s escrow fund until contacted by a reporter in October.

“I’ve wondered about that, but not ever pursued the issue,” the retired librarian said by phone. “You get this paperwork that basically says there’s going to be a hearing, but it’s not cost effective or generally time effective when you don’t know what’s going on. It’s a fairly complicated matter, and I figured it was probably not worth it.”

According to Gas and Oil Board records, Brents owns the gas beneath 28 percent of the acreage in unit W-9 – an 80-acre square; a coal company owns the coal, and the corresponding sub-account in escrow contains $150,000.

Gas still flows from the original well in W-9, but the unit no longer exists as such; it is now part of a larger unit known as a gob, where multiple wells siphon coalbed methane from a mined-out panel of coal. The change in the well status required a new sub-account in escrow, in which Brents owns gas rights to 9 percent of the acreage. That account contained almost $75,000 as of October.

And these are only two units in which Brents has an interest; her two tracts of land almost certainly spill into other units, meaning she is entitled to royalties from gas production there, too.

When informed of how much money is in escrow, Brents said, “Oh, my goodness. Oh, my word.”

She would like to figure out how to collect her royalties, she said, “But I’m not even sure where to start.”

She is far from alone.

The number of people entitled to royalties in escrow stretches across the country, but even local residents and state agencies are oblivious to what they own, let alone how to collect it.

Shirley Keene, of Raven, Va., and her siblings are regulars at Virginia Gas and Oil Board hearings, and have been more or less disgruntled with gas industry practices since 1993.

By her calculation, CNX has 28 producing wells on her family’s two tracts of land – one 43 acres and the other 15 acres. Over the years, the Keene heirs have hired three attorneys to help them get their royalties out of escrow – so far, without success.

Keene, disabled from a car accident six years ago, has never seen an accounting of what goes into escrow. After 16 years, she has no notion of what her share of the escrow proceeds are.

“We do not have an inkling whatsoever of what we have in there,” she said in a recent interview. “I don’t even know how to go about it.”

Neither does the Virginia Department of Corrections, which – in addition to running the Keen Mountain Correctional Center in Buchanan County – owns gas rights to 47 percent of the acreage in unit W-9.

“We don’t have anyone who oversees our mineral interests, and we would have the Attorney General’s Office look over our contract,” said department spokesman Larry Traylor. “We’re not even sure the documents exist.”

Traylor's agency has some bureaucratic kin in W-9, where the Virginia Department of Transportation owns the gas to 3 percent of the unit's acreage. VDOT owns another 3 percent in unit AY-101 – whose corresponding escrow sub-account holds only $34. It is impossible to know what should be in that account because CNX, the unit operator, never filed the necessary paperwork to escrow royalties. The gas company refused to comment on specific wells.

Asked whose job it is to oversee VDOT's mineral interests, Ken Brittle, the agency's district administrator for Southwest Virginia, said, "We don't have a person."

Both VDOT and VDOC referred a reporter to the Office of the Attorney General, where a spokesman pointed to the Department of Mines, Minerals and Energy. There, the director of the Division of Gas and Oil answered, "Each agency is independently responsible for their land management responsibilities."

"People are getting royalties"

Bureaucratic quandaries aside, an architect of the Virginia Gas and Oil Act recently said the legislation accomplished its intent.

Tommy Hudson, who runs the Richmond lobbying firm W. Thomas Hudson & Associates, was part of the 1989-90 task force that proposed the 1990 act. When asked if he was surprised that the 20-year-old question of coalbed methane ownership persists, he called it an "interesting question."

"I think the legislature set up a mechanism that will drive all parties to the negotiating table and allow a valuable resource to be developed," Hudson, who is president of the Virginia Coal Association, said by phone.

It is unquestioned that the 1990 act expanded coalbed methane production and supercharged the mineral severance taxes that local governments receive.

In one year, 1990-91, severance taxes from natural gas production in Wise County quintupled, county records show. In Russell County, gas severance taxes have risen steadily to nearly $2 million in 2009, and Buchanan County last year banked more than $5 million from a methane tax.

As for the question of coalbed methane ownership, Hudson said, "Perhaps the fact that there has been no final resolution shows you that it has worked as intended. People are getting royalties and apparently [. . .] there are no disputes that have risen to the point of being final and litigated."

Hudson was unaware of the $24 million parked in escrow that royalty owners are not getting. He also seemed unaware that the ownership of coalbed methane has been litigated at length, and that the Supreme Court of Virginia has ruled on it.

The state's highest court in 2004 determined that a surface owner who sold only coal retained the rights to all other minerals, including coalbed methane. And it is that ruling that keeps people like Jamie Hale and Shirley Keene away from the negotiating table, hardening their conviction that they own 100 percent of the royalties from their coalbed methane.

Coming Tuesday: *How a long-awaited state Supreme Court decision came – and changed nothing.*

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Flag Comment Posted by Next ? on December 07, 2009 at 12:43 pm

saywhat,
I read and saw on the News sometime back where Phillip Pucket went to bat for the land and mineral rights owners but had very little if any sucess. The Oil and Gas companies control our elected officials and have them in their pockets.

Flag Comment Posted by saywhat on December 07, 2009 at 11:29 am

Words can not begin to explain my feelings on this.

Another case of the government legalizing the left of private property.

Where are the politicains who are for the people on this one????

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Captive assets: conflict over gas rights traps royalties in escrow accounts

MARK GORMUS|RICHMOND TIMES DISPATCH

Representing individual land owners, Aylett, Va., attorney Peter Glubiak won a 2004 Supreme Court of Virginia decision over a North Carolina-based coal company. The ruling awarded landholders royalties on 100 percent of the coalbed methane underlying their property.

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FOR MORE INFORMATION, including a database of accounts associated with wells, click here.

By Daniel Gilbert | Reporter / Bristol Herald Courier
Published: December 8, 2009
Updated: December 10, 2009
» 1 Comment | Post a Comment

In 2000, a country lawyer named Peter Glubiak listened to his secretary's story of an energy giant draining coalbed methane gas from her family's land, and of the royalties that were locked up in a state-run escrow account.

The source of Ann Graham's dilemma, Glubiak realized, was a question that legislators ducked when they passed a 1990 law to spur the development of coalbed methane gas: the all-important question of ownership.

Until passage of the Virginia Gas and Oil Act, no one in the state had given much thought to who owned a gas that clings weakly to a coal seam, long considered nothing but dangerous to miners for its explosive properties. By creating a legal mechanism for energy corporations to commercially produce coalbed methane, the General Assembly dramatically raised the stakes of that question – particularly when different people owned the coal and the gas rights for the same tract of land.

A circuit court's decision could tip millions of dollars in royalties one way or the other, Glubiak calculated, and either result would unquestionably end up in front of the Supreme Court of Virginia.

As it turned out, that projection proved half true.

In Buchanan County Circuit Court, Glubiak argued that Graham and another family, the Ratliffs, had severed only the coal from their land and owned all of the gas beneath it, including coalbed methane. Opposing him was a North Carolina-based coal company, Harrison-Wyatt, represented by J. Scott Sexton, a prominent mineral lawyer out of Roanoke, Va.

Glubiak prevailed in the trial court and in 2004, the Supreme Court of Virginia unanimously affirmed the lower court's decision.

Citing common definitions of coal at the time the Ratliffs sold the mineral, the Supreme Court held that the "title to the [coalbed methane] did not pass to the coal owner," and ruled that the Ratliffs were entitled to all royalties in escrow and future royalties from gas beneath their land. About a year later, the family collected their royalties from escrow and began receiving monthly royalty checks for 100 percent of their interest in the gas.

"When we got the Supreme Court ruling in the Ratliff case, my hope was that this would evolve into a pretty lucrative practice," Glubiak said in a recent interview. "Very disappointingly, it has not."

In the five years since Glubiak's high court victory, millions of dollars from coalbed methane royalties have flowed into the Virginia Gas and Oil Board's escrow fund, tripling its balance. Despite the Harrison-Wyatt precedent, those royalties are no easier to extract from escrow today than before the court rulings.

Already tested

Four days after the Supreme Court's decision, the Department of Mines, Minerals and Energy issued a statement making it clear that the ruling changed nothing in how it regulated coalbed methane production.

The case "specifically applies to three particular tracts of land in Buchanan County," the state agency wrote.

Not only did the DMME and the Virginia Gas and Oil Board lack the authority to determine coalbed methane ownership, the agency wrote, "neither the Virginia courts nor the legislature has addressed this ownership issue other than on the basis of analysis of individual deeds."

In other words, the board still would escrow royalties from coalbed methane production whenever the coal and the gas were separately owned for the same tract of land. For a surface owner who had severed only the coal from his land to collect coalbed methane royalties, he would have to fight Glubiak's fight all over again.

This is incomprehensible to many landowners who, like Ann Graham and the Ratliffs, own the gas under their land.

Force-pooled owner Jamie Hale has read his deed and the Supreme Court's opinion that gave Graham and her family 100 percent of the coalbed methane.
"My case is identical to hers," Hale said as he drove with a reporter through the mountainous 40 acres he owns, where seven wells are draining coalbed methane.

"Now we're told we have to prove something we've already proved. Why should we have to hire a lawyer to prove what already belongs to us?" he asked. "If you do hire an attorney, you might as well take a split agreement. I really don't know where to go or what to do."

Shirley Keene is an heir to two tracts of land that contain 28 gas wells. She has always believed she and her family should receive 100 percent of the royalties from coalbed methane, she said recently.

"When the Ratliffs won their case, then we knew that it was ours," Keene said. "If Ratliff had turned the other way, you would never have heard a word from us."

At his home outside Richmond, Va., Graham Tiller and his wife have been waiting on a decision that will settle, once and for all, who owns coalbed methane.

Tiller, 77, is a Dickenson County native with an interest in more than 700 acres. His great-grandfather sold the coal and left him, in the eyes of the state, in conflict over coalbed methane with the current coal owner, Range Resources.

"I can't afford a lawsuit by myself, but I'm not going to give it to them," Tiller, who retired as a utilities coordinator for ICI, a chemical company in Hopewell, Va., said of splitting with the company. "If I had plenty of money, I'd have done had a lawsuit with them."

The DMME's logic – in continuing to escrow royalties when coalbed methane ownership is in dispute – escapes several state legislators.

"I think the Supreme Court's already tested that," Sen. William Wampler, a Bristol Republican, said when asked about the lingering controversy over coalbed methane ownership.

"If you are a small royalty owner, and you have $500 in escrow, how do you have the financial resources to claim those dollars when that probably doesn't even cover attorney fees?" Wampler asked. "If we have $25 million in escrow, that's a lot of money. I don't know why the DMME wouldn't hire a dedicated person to contact the names of those who have been force pooled."

The answer is that once royalties go into escrow, members of the Virginia Gas and Oil Board have their hands tied; the board can only release funds from escrow with a court order, or an agreement between people who dispute coalbed methane ownership.

One legislator believes the board should not be placing coalbed methane royalties in escrow at all.

"It should never go into escrow," Sen. Philip Puckett, a Lebanon Democrat, said in an interview.

This might run counter to his personal interest: In a recent twist, the bank that employs Puckett, First Bank & Trust, has won the contract to manage the escrow fund for the next four years beginning in January.

Puckett repeatedly has said that if an individual has a deed similar to the Ratliffs' – severing only the coal – then the owner should be able to present that to the board and claim the royalties. The senator is looking into the possibility of amending the Virginia Gas and Oil Act to codify the Supreme Court's ruling.

"Most of our people can't afford to go to court," Puckett said.

But suing for ownership remains virtually the only way for a surface owner to collect 100 percent of the coalbed methane royalties.

Leveraging a precedent

The coal industry likewise has taken the stance that coalbed methane ownership hinges on the language of specific deeds, and the Harrison-Wyatt decision did not conclusively resolve the ownership question.

In private, though, at least one major corporation acknowledged the significance of the Supreme Court's ruling, and waived its claim to coalbed methane royalties, according to correspondence obtained by the *Bristol Herald Courier*.

In 2004, a few weeks after the Supreme Court ruling, an agent of three heirs with substantial landholdings in Dickenson and Buchanan counties contacted the energy company with whom they had previously agreed to split coalbed methane royalties down the middle.

Charlie Bartlett, a consulting geologist and agent for the 1,000-acre William Baker estate, wrote to the president of Pine Mountain Oil and Gas and requested 100 percent of the royalties.

On June 9, 2004, Richard Brillhart, then president of Pine Mountain, contacted the operator of the coalbed methane wells on the Baker land about Bartlett's request.

"Given the close similarity of the language in the severance deed at issue and the severance deeds analyzed by the Virginia Supreme Court, it appears that, at this point in time, Pine Mountain would not be successful in a claim for the coalbed methane on this tract," Brillhart wrote.

Brillhart waived his company's claim to the gas produced by six wells; the next month, he waived a claim to royalties from two additional wells.

The three Baker heirs – a doctor, an investor and a former university executive – all had moved away from Southwest Virginia but have several advantages most royalty owners do not enjoy.

Bill Baker, the original heir to his father's estate, was an engineer and kept detailed records of the family holdings. He became friends with Bartlett, a longtime geology professor at Emory & Henry College who agreed to look after the estate following Baker's death. Bartlett testified as an expert for Glubiak during the Harrison-Wyatt case.

"We were fortunate enough to have Dr. Bartlett's assistance," Betty Anne Cox, one of the heirs, said by phone. "All of my generation were living away," said Cox, who lives in Hartford, Conn., and retired as the director of external affairs for Trinity College.

"It was very good to have somebody who was both knowledgeable and who we trusted and who knew all the players," she said.

Even so, their struggle did not end with Brillhart's 2004 letter that waived a claim to all coalbed methane royalties.

In late 2007, tiring of requesting royalties in piecemeal fashion, Bartlett asked Pine Mountain, which had since been acquired by Range Resources, to authorize a "complete release for these wells and any other remaining wells that may be drilled in the future on this same tract."

Bartlett said that when he approached Jerry Grantham, a vice president at Range Resources, to ask him to waive his claim, Grantham offered to split the royalties, giving 75 percent to the Bakers.

Grantham, who is also president of the Virginia Oil and Gas Association, declined to comment on a private contract, but said his company found such a split "to be a pretty effective agreement in trying to get money out of escrow, benefiting all parties involved."

In a March 7, 2008, letter, Range Resources registered a change in its approach toward the Baker heirs. Grantham wrote that the company would waive its claim for certain wells if the heirs signed a confidentiality agreement.

The Baker heirs retained Glubiak to help them collect money from escrow, and on March 19, 2008, Glubiak wrote to Grantham with a 10-day ultimatum.

"We have no intention of signing any confidentiality agreement," he wrote. "In the alternative, I have been authorized to pursue a declaratory judgment action in Dickenson County pursuant to the Harrison-Wyatt case, and I feel confident of a successful result."

The company agreed, and the Baker heirs began receiving their royalty payments, Cox said.

But at the time of Glubiak's letter, the Harrison-Wyatt case was quickly losing currency as a decisive precedent on coalbed methane ownership.

Coming Wednesday: *A coal company fights back.*

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Editor's Note: This article was corrected on Dec. 10, 2009.

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Flag Comment Posted by Ken on December 08, 2009 at 6:49 pm

I have 100 acres in Harmon, VA. and a contract with CNX for a gas well and road. I was not pleased with the agreement and understood there was no recourse. Now I know why.
The VA. government sides with business in the applachan mountains as did all levels of government side with coal mine owners during the coal mine wars and battle of Blair Mountain…Ken Barlow

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Coal companies block efforts to access natural gas royalties

DAVID CRIGGER/BRISTOL HERALD COURIER

Mike and Ferrell Whited look over paperwork concerning gas wells on their property near Swords Creek, Va.

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By Daniel Gilbert | Reporter / Bristol Herald Courier
Published: December 9, 2009
Updated: December 9, 2009
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On an early November day, Michael Whited, mounted on an all-terrain vehicle, checked the meter at a highly productive well named AY-112. Coalbed methane was flowing out of the ground and into a pipeline at the rate of 176,000 cubic feet a day – enough gas to satisfy the heating and cooking needs of the average American home for almost two years.

“I just check it to see how much they’re ripping us off,” Whited said.

Since 2001, 14 wells on the Whited land have produced 4.4 billion cubic feet of coalbed methane. That volume would generate about $30 million in gross proceeds for the gas operator, based on historical monthly averages of natural gas prices for two major interstate pipelines in the region.

As the owners of the surface land and the gases beneath it, the Whiteds are entitled to a one-eighth sliver of the proceeds from coalbed methane drained from their property. But because they do not own the coal, the Virginia Gas and Oil Board ordered that their royalties be placed into an escrow fund until the ownership of coalbed methane could be decided.

In the spring of 2004, the Supreme Court of Virginia issued a decision that spread like wildfire among mineral owners in Southwest Virginia, upholding a lower court ruling that a surface owner who sold only the coal from his property retained rights to all of the coalbed methane. The ruling in Harrison-Wyatt v. Ratliff buoyed landowners like the Whiteds, who had stood by empty-handed as gas companies drained their coalbed methane.

Earl Whited, the family patriarch who started out as a school bus driver, knew he had a claim to at least several hundred thousand dollars in escrow. In 2005, he retained Peter Glubiak, the attorney who had won for the Buchanan County surface owner in the Harrison-Wyatt case.

Glubiak had spent four years litigating the ownership of coalbed methane, and armed with the high court’s ruling, he figured getting the Whiteds’ royalties out of escrow would be smooth sailing.

But it didn’t turn out that way.

A trial of each tract

The large amount of royalties at stake had made it possible for Earl Whited to hire Glubiak, who worked on a contingency basis and charged a percentage of whatever his client recovered from escrow. But it also stirred a vigorous defense from another party – the company that owned the coal beneath the Whited land, who asserted a right to the coalbed methane royalties in spite of the Harrison-Wyatt ruling.

From the outset, Buckhorn Coal Co. made it clear it would not respect the Supreme Court’s ruling that a surface owner who sells only the coal retains rights to the coalbed methane.

“We think it’s a bad decision,” Charles Hart, managing partner of Tazewell, Va.-based Buckhorn, said in a phone interview. “You have to defend your interests. You can’t just roll over and say, ‘Here it is.’ ”

The defense went like this, as argued by Buckhorn’s lead counsel, Eric Whitesell: Coalbed methane ownership “can be reached only after a trial of the title of each tract” of land.

With that, Buckhorn heaved the burden of proving ownership squarely onto the Whiteds.

The plaintiffs, Buckhorn claimed, failed to identify the exact location of the boundaries where they claimed mineral interests. They failed to include a survey. They failed to name other parties who might have mineral interests in the same drilling units. They got the names wrong on the pleadings.

Complicating the plaintiffs' case was that Earl Whited died early on in the litigation, in October 2006, and left his estate – and his active lawsuit – to his six children. Discord broke out among the heirs, and the two who had been designated executors ceded their authority to a professional administrator, Ralph Snead.

In a June 2007 letter briefing Snead on the case, Glubiak wrote, "We have been battling Buckhorn Coal over what proved to be extremely complex title issues, as well as boundary and ownership issues."

A year later, with Buckhorn promising an appeal to the state Supreme Court if it lost, Snead presented the Whited heirs with three options: Pay $12,000 out of pocket for a survey and title opinion; negotiate with Buckhorn to split royalties; or none of the above, and Glubiak would withdraw from the case.

The heirs balked at the fee for additional title work, but could not agree on how to proceed. Snead, as administrator of the estate, unilaterally decided to authorize Glubiak to negotiate a split agreement.

Coal goes on the offensive

Buckhorn Coal has never won 100 percent of coalbed methane royalties, and Charles Hart never expected to in the Whited case.

"When there's a conflict, we will split the royalties 50-50," he said. "We like to do that, because once it gets into that escrow account, if nobody pushes the issue, you'll never get any money.

"Fifty percent is better than nothing," he said.

And Hart is adamant that the Supreme Court got it wrong in the Harrison-Wyatt case.

J. Scott Sexton, a Roanoke, Va., lawyer, represented the losing coal owner, Harrison-Wyatt, in that case. Asked recently whether he thought the Supreme Court's ruling resolved the ownership of coalbed methane, Sexton reflected, carefully parsing his words.

"The Harrison-Wyatt decision established the law in Virginia that a coal owner claiming title under an unambiguous coal-only deed does not own the coalbed methane," he said.

In plain language, when a surface and gas owner sells only coal, the coal does not include coalbed methane; the surface owner keeps that. But that decision has come under increasing assault – in and out of court – by coal owners in the years since the courts ruled on coalbed methane ownership.

Coal owners routinely propose royalty split agreements they tout as "the most economical and expedient way" to collect money from escrow, according to split agreements reviewed by the *Bristol Herald Courier*.

Some outright deny the Supreme Court's ruling in Harrison-Wyatt.

In November 2008, one coal owner wrote to Jimmy Smith, of Coeburn, Va., and proposed to split royalties: "The Commonwealth of Virginia has not made a judicial determination of ownership of coalbed methane."

The offer was signed by John Mooney, vice president and regional manager for NRP Operating LLC, a subsidiary of Houston-based Natural Resource Partners LP, which earned gross revenues of $292 million in 2008 – including $8 million in gas and oil royalties, according to its financial filings. Mooney did not respond to phone or e-mail messages seeking comment.

Glubiak, in representing various clients' mineral interests, has encountered this assault firsthand.

"It's my contention that the coal industry decided that if they put up a united front, then they can scare people off and into doing these godforsaken split agreements," he said. "Most people say, 'I can't pay some lawyer $50,000 to fight my case with you.' There are millions of dollars at stake, and [coal companies] used this as a bludgeon to beat up people and threaten what they're going to do."

As for the argument that the Harrison-Wyatt decision is limited to the deeds in one case, Glubiak said, "I will defend to my dying breath [against] this crap that's going on now that it's only a Buchanan County case. If the severance deed says 'coal only,' the surface owner wins; the surface owner owns the gas."

The split

By 2008, Glubiak was pursuing for the Whiteds the very type of agreement he abhors – a 50-50 split – and four of the heirs retained another law firm to halt the negotiation. They spent $7,500 before eventually, in February 2009, endorsing the split.

The upshot is this: The Whited heirs will receive 50 percent of the royalties in escrow, minus 30 percent for the services of Glubiak and Snead. After that payout, the Whiteds and Buckhorn evenly will split the one-eighth royalty. As of October, Snead had collected more than $300,000 from escrow to distribute among Glubiak, the Whiteds and himself.

"We didn't really have much choice, I don't guess you'd say," Cathy Ward, a Whited heir who favored the split agreement, said in an interview. "When you're up against these big companies, you're not going to win. You don't have much of a chance. I knew the way Buckhorn was dragging it out in court, they was just going to keep fighting us."

Ferrell Whited, a disabled coal miner and the oldest of the heirs, is still angry about the split.

"Glubiak sold us out. And the judge. They sold us out. And our administrator – they sold us out."

Glubiak and Snead, for their part, contend they did their all for the Whiteds – a difficult, conflictive group of clients, they said, and that the unhappy result is a reflection of the extraordinarily complex requirements of collecting royalties from escrow. The Whiteds still will receive many thousands of dollars each in royalties, they pointed out.

"It is a lousy system," Glubiak mused. "Could they have done a split at the beginning? I don't know, maybe, maybe not."

Turning to Buckhorn and the coal industry, Glubiak said, "You know what the most embarrassing part of this is? They beat me."

After four years of absorbing the costs of the litigation, Glubiak said, "I just couldn't do it anymore. I just gave up."

This, he acknowledged, handed the industry "tremendous support emotionally and legally" in its fight for coalbed methane royalties.

The split agreement did not settle everything for the Whiteds. They still have interests in other coalbed methane wells, and the Virginia Gas and Oil Board is funneling those royalties into escrow. None of the heirs seemed willing to go through another lawsuit, or to split them with Buckhorn.

Said Ferrell Whited: "We'll just sit back and let the escrow build and just will it to our grandkids."

dgilbert@bristolnews.com | (276) 645-2558

Coming Thursday: Who knew that the escrow fund was losing money?

Reader Reactions

Voice your opinion by posting a comment.
Flag Comment Posted by Heather Provencher on December 10, 2009 at 1:19 pm

** The following comment was emailed to TriCities.com from a reader **

I too, like many other ancestors of the Tiller clan, have a very small interest and share of the royalties involved. However, we do live in America and I believe our rights are being trampled on by the gas companies and unfortunately by the state of Virginia. It appears the only course we can pursue is through your articles, which is bringing this injustice to light. Keep up the good work.

~ Mason Tiller

Flag Comment Posted by BP on December 09, 2009 at 3:09 pm

Profit over people. Profiteers over people. Government at every level has abandoned “We, the People. . .“ to serve the will of corporations. Demonstrated with compelling clarity in this article.

Flag Comment Posted by LillLudkowski on December 09, 2009 at 2:13 pm

My father also refused to sign an agreement with Equitable. He told them to go around his land, but they went ahead and destroyed our ancestral property located at Priest Fork in Dickenson County. Roads were bulldozed, large numbers of trees were cut down and left for us to clean up, and no remuneration for damages has of yet been forthcoming. When my father became too ill to make legal decisions for himself, I assumed the position of his power of attorney. I attempted to collect back compensation from Equitable for damages, but they offered to settle for a pittance, and in return they expected me to sign away my father’s rights, my rights, and the rights of any and all descendants into perpetuity. Yet, I still pay the taxes on the property, but my family is made to feel like trespassers on our own land when we encounter anyone from the gas company on our property. I live in Chicago, so it is difficult to keep an eye on what Equitable is up to from 500 miles away. Although I no longer live in Dickenson County, my heart is still there, and I am incensed by the way the residents of SW Virgina continue to be abused and taken advantage of. Between the destruction of our beloved mountains by the coal companies, the methodical robbing and pillaging of our people and our land by the corporations, and the apathy of our elected officials and our court system, I worry about the future of the mountain way of life. Thank you, Mr. Gilbert, for writing such a well-researched and thought provoking series of articles. I hope they will make a difference.

Lillian Duty Ludkowski

Flag Comment Posted by lswark on December 09, 2009 at 1:45 pm

It’s Erin Brockovich all over again! How many times do we have to fight this battle before the Legislature takes action?

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Natural gas escrow fund bleeding money

Greg Moore/WSLS

The Wachovia Bank branch, at 201 S. Jefferson St. in Roanoke, Va., has been the physical address of the Virginia Gas and Oil Board’s escrow fund since 2006.

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By Daniel Gilbert | Reporter / Bristol Herald Courier
Published: December 10, 2009
Updated: December 10, 2009
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On the morning of Sept. 29, 2008, as the world woke up to unprecedented turmoil in financial markets, the normally placid director of the state Division of Gas and Oil considered a worst-case scenario for the $23 million escrow fund he administered.

The millions were compensation for Virginia landowners whose mineral rights the state had leased to private energy corporations, often against owners' will or without their knowledge. The money waited in escrow for safekeeping until the question of individual ownership could be resolved.

Suddenly, it seemed in jeopardy.

Managing the fund was Wachovia Bank, which by the fall of 2008 had been brought to its knees by its ill-fated acquisition of junk mortgages at the height of the housing bubble. With investor confidence plummeting, the Federal Deposit Insurance Corp. swooped in to facilitate an emergency sale of Wachovia to Citigroup early on Sept. 29.

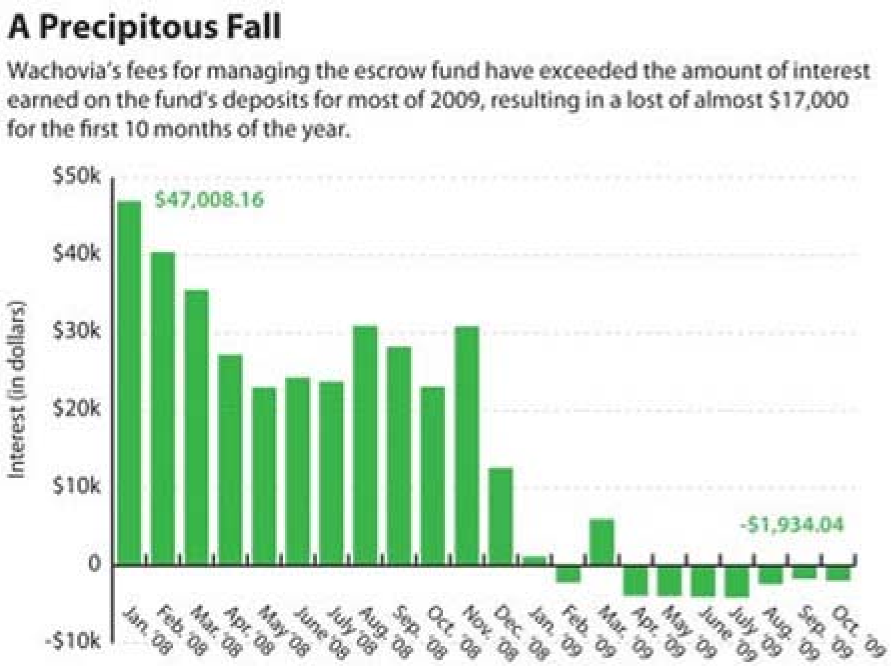
At 9:06 a.m., DGO Director David Asbury e-mailed his contact at Wachovia and floated a question with a quivering parenthetical: "Under a worst case scenario, assuming Wachovia fails. . . what value (if any) would remain in the Escrow Account?"

It also occurred to Asbury, who had been in the job for just five months, to ask if each sub-account in the fund was FDIC-insured. The answer, it turned out, was that the entire $23 million fund was insured for $250,000.

This particular financial drama unfolded out of the view of thousands of royalty owners, who receive no accounting of their funds in escrow. At the end of the tumultuous week, Wachovia was acquired by Wells Fargo, and the escrow fund did not lose value – at least not immediately.

What the episode reveals is how little members of the Virginia Gas and Oil Board – the state regulatory body with exclusive authority over the escrow fund – know about the fund's operations, leaving the details to Asbury, according to interviews, hundreds of pages of board hearing transcripts and internal correspondence obtained by the *Bristol Herald Courier* through a Freedom of Information Act request.

Board members often lack seemingly important information, such as the interest the escrow fund is earning and how its deposits are insured. They do not receive monthly statements from the bank, and some were unaware – as recently as November, when they voted on awarding a new contract for escrow services – that the fund has been losing interest on its deposits for more than half a year.



A precipitous fall

The man in charge of administering the escrow fund has a quiet, polite manner in person. He is responsive to media inquiries, but speaks only through e-mails; he declined interview requests for this story and others.

As director of the Division of Gas and Oil, David Asbury is also the "principal executive to the staff of the [Virginia Gas and Oil] Board" – a somewhat grand-sounding job title for a staff of just two. Asbury and Diane Davis, programs administrator for the DGO, are the only state employees who handle the escrow fund and the board's records.

"He's not a guy who goes home when the clock goes off," Donnie Ratliff, a board member who represents coal interests and who worked with Asbury at Pittston Coal Co., where the director was an engineer, said in an interview. "There is no one more dedicated and conscientious than David."

On Oct. 10, 2008, Wachovia representatives traveled to Abingdon, Va., to meet with Asbury at the Division of Gas and Oil's former office there. After several tense weeks, the bank officials were eager, as one wrote, "to more broadly discuss our mutual relationship and services being provided."

At the meeting, Wachovia recommended that the board shift its investment policy to a more conservative asset allocation.

Eleven days later, at the board's October hearing, Asbury advised members to adopt the bank's suggestion.

"We are giving up about a percent of earnings potential, but it is also reducing our risk to as close to zero risk as we can," he said.

Bruce Prather, a consulting geologist who represents the gas and oil industry on the board, asked Asbury, "During the upheaval [. . .] did we lose any money?"

Asbury replied, “No, we did not.”

But even as he spoke, the fund’s interest income had begun to flat-line.

The escrow fund started off January 2008 by earning $47,000 in interest. By October, interest had dropped by half to $23,000.

Now, with the fund’s more conservative investment mix, the interest income plunged – to $1,170 in January, and into negative territory in February at a $2,173 loss.

The reason for this, as a bank representative explained to the board six months later, was that interest rates were “very, very compressed” – so much so that the bank’s servicing fees were higher than the interest that escrow deposits were earning.

It is unclear if any board members were aware of this when, in March 2009, they voted to extend Wachovia’s contract through the end of the year. The evidence suggests that they were not.

At the board’s June 16, 2009, hearing, Asbury presented members with the first-quarter report for the escrow fund, which had a net interest income of $5,000 – $118,000 less than what it netted over the same period the previous year.

The first-quarter report masked the worsening situation; by May, the escrow fund had experienced three months of income loss since the beginning of the year. But Asbury did not address this during the hearing, and board members asked no questions. The “investment risk assessment” on the docket was continued.

Two days later, on June 18, Asbury and Diane Davis traveled to Roanoke to discuss the escrow fund with the Wells Fargo-Wachovia investment team.

Late that night, Asbury sent an e-mail to Butch Lambert, chairman of the Gas and Oil Board, and copied Sharon Pigeon, the senior assistant attorney general who advises the board, on what he learned.

“Recent analysis of the Escrow reflects a significant decline in monthly interest income,” Asbury e-mailed at 10:57 p.m.. “For the second time in the account’s history, monthly expenses have exceeded monthly interest income.”

In conclusion, Asbury wrote, “We were very pleased with today’s focused but productive meeting and have a high level of confidence in the new Wells Fargo-Wachovia.”

June would be the fourth month of the year that the escrow fund lost interest. But Asbury’s e-mail was the first written acknowledgment to a board member of the negative income.

“He handles this account”

In July 2009, with the escrow balance now at nearly $25 million, board members received the fund’s second-quarter report from a Wachovia official, who broke the bad news this way.

“Income from investments and then netted from expenses of servicing the account were negative $6,793,” Patrick Dixon, a senior vice president for Wachovia, told the board.

Board members also learned that although the bank charged a service fee of $8 per sub-account – nearly $6,000 a month – the entire fund was FDIC-insured for only $250,000. For the other $24.5 million, Wachovia pledged collateral to a third-party trustee, the Bank of New York.

This was in fact a substantial improvement in the security of the fund, thanks to a February change adopted by the Treasury Board of Virginia to require banks holding more than $250 million in public funds to pledge 100 percent collateral for every dollar not insured by the FDIC. As of September, Wachovia held $487 million in public deposits, according to treasury records, making it the second-largest such holder in the state.

In September 2008, Wachovia had collateralized only half of the assets it held for the board.

“With the instability last fall, there was concern that possibly that requirement was not adequate,” Kristin Reiter, director of operations for the Virginia Department of Treasury, said in explaining the new regulation.

The escrow fund’s negative income, in particular, caught board members by surprise.

“Do you let somebody know when you think that we’re going to run a deficit on these costs?” Bruce Prather asked Dixon, the Wachovia vice president. “It’s rather a surprise to us that we find out we’re running in the deficit because we’ve got a lot of money in there.”

The ensuing discussion focused on whether to shift assets into a higher-earning combination; only one board member, Katie Dye, asked the bank if it was “negotiable” on the $8 charge per account.

Dixon, noting that the board soon would solicit bids for a new contract to manage the escrow fund, said Wachovia would wait to negotiate until submitting a bid.

As the discussion wore on, Asbury’s central role in handling the fund emerged.

“See, we as a board, we never have access to the information that you’re talking about because it comes through David,” Prather said to the bank representatives. “In other words, he handles this account.”

Asbury defended the investment policy.

“I think the board made a smart decision last fall during turbulent times to place them in the very lowest-risk potential that there was,” he told board members. “And although we are showing negative income during the second quarter, I believe there is a potential to reverse that by the calendar year end.”

Seeking to staunch the bleeding, the board voted to move half of its funds invested in AAA-rated U.S. government obligations into a higher-earning Wachovia money market fund.

The escrow fund lost $4,000 in July, and it has lost money every month since April, for a nearly $17,000 loss for the first 10 months of the year.

Asked by a reporter about the losses that are eroding the fund’s value, Asbury noted that the fund has not lost its principal – meaning that royalty deposits from gas operators are still higher than the losses of interest income.

“The negative interest income for 2009 is disappointing but is a result of financial market conditions,” Asbury e-mailed the newspaper. “Losses may have been worse but for the safe investment posture required for public accounts and adopted by the Board.”

Prather, asked the same question, said: “We’re trying to resolve that.” He would not elaborate.

Bill Harris, a public board member from Wise County, said it was “not a good situation to be in.”

It was worse than he knew.

When informed of the total losses so far this year, he said, “No, I was not aware we were losing like that.”

Neither was Donnie Ratliff, the board member who represents the coal industry and who was not present at the July 2009 meeting when Wachovia officials explained the negative income.

“I don’t see those numbers,” Ratliff said when asked at the Nov. 17 board hearing, hours before the board voted on awarding a new contract for escrow services. “I don’t know how that happened.”

At that meeting, board members had to choose between Wells Fargo-Wachovia or First Bank & Trust, an Abingdon-based bank.

An evaluation team of five state employees – including Asbury and Diane Davis – ranked Wachovia higher in every category. First Bank, though, offered less expensive services.

The board voted to award the contract to First Bank, beginning in January.

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Coming Friday: What’s missing from the escrow fund?

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Barry Tiller

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They learned how to rob you from how they rob the Veterans with the Agent Orange Trust Fund set up for Veterans.

They will transfer the fund around and change the rules over and over all the while stealing all they can then passing it along to another thief. Then they will offer all those with claims a settlement which will be pennys.

Flag Comment Posted by iwrose on December 10, 2009 at 11:50 am

as a landowner who has a gas well drawing gas from family property for over 20 years with no royalties paid. ill say that the gas companies can do just about anything they want to.they have about the same attitude as pittston did back in the early days.

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Underfoot, Out of Reach, Part Six: Where are the gas royalties?

David Crigger|Bristol Herald Courier

Denny Sutherland visits one of the natural gas wells on his property near Birchleaf, Va.

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FOR MORE INFORMATION, including a database of accounts associated with wells, click here.

By Daniel Gilbert | Reporter / Bristol Herald Courier
Published: December 11, 2009
Updated: December 14, 2009
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In one 80-acre square in Buchanan County, a gas company sucked up 1.6 billion cubic feet of coalbed methane gas in 2½ years – enough to satisfy the heating and cooking needs of about 18,000 homes for a year.

Some of the gas in that unit – dubbed W-8 by state regulators – is the property of owners who are not getting paid for it, including Buchanan County, which owns 14 acres. The producer, CNX Gas Co., should have been making royalty payments into a state-run escrow fund for those owners.

For 2½ years, it didn't.

In March 2008, CNX discovered it never filed the necessary paperwork with the state Division of Gas and Oil to escrow royalties. Two months later, the company deposited more than $861,000 into the escrow sub-account for W-8, making it the largest account in the $24 million fund.

The W-8 case points to a significant regulatory gap, one in which the state agency overseeing the escrow fund didn't notice nearly a million dollars missing from an operator for years.

The company caught its own error. But W-8, it turns out, is not an isolated case.

The *Bristol Herald Courier* compared monthly gas production in units like W-8 that should generate payments into escrow with actual payments into escrow from January 2008 through June 2009.
The analysis revealed that about one-third of the 750-plus active sub-accounts in escrow received no deposits for the months when the corresponding wells produced gas. Of those, nearly 100 sub-accounts received no deposits for all 18 months.

The Division of Gas and Oil has offered a series of evolving explanations in response to the *Herald Courier's* analysis. Initially, the DGO posited on Nov. 6 that the discrepancies were the result of changes in the status of a well, such as when a coalbed methane well is swallowed up into a larger unit and owners begin receiving royalties in a separate escrow account. Or, the DGO suggested, gas companies were waiting to pay royalties until they reached a $1 threshold.

When presented with specific examples of escrow sub-accounts with very low balances – from 12 cents to $2.30 – despite high production from corresponding wells, the DGO responded that they were reasonable given the small amount of acreage subject to escrow. That explanation, however, ignored the fact that in several of the cases, no royalties were escrowed because the necessary paperwork has never been filed.

When presented with specific examples of missing paperwork, the DGO's parent agency, the Department of Mines, Minerals and Energy, issued a statement Nov. 16 that it "has been aware of the discrepancies between reported production and deposits to the escrow account" and "has taken a number of steps to fix the problems. Your questions have been addressed to DMME in the middle of this work."

The statement also acknowledged that DMME has been aware of a "backlog" of incomplete board files since "early 2009," and declared that the agency has assigned additional staff to clear it, as well as review individual account information. These incomplete files raise questions about how much money is missing from the escrow fund, as well as the DGO's ability, at current staffing levels, to ensure that gas companies comply with the governing law and regulations.

There are also uncertain implications for sub-accounts in escrow that should be receiving royalty payments but are not, landing awkwardly at the intersection of the Virginia Gas and Oil Act and the Uniform Disposition of Unclaimed Property Act. In all, 190 sub-accounts in escrow received no royalty payments for the entire 18-month period, which makes their combined contents of $3.8 million look like unclaimed property, ripe for the Virginia Department of Treasury to seize.

Queried about how the DGO determines when funds in escrow are unclaimed property, its director, David Asbury, responded that royalties in an escrow sub-account would be considered abandoned “once active production payments stop and there is no evidence of activity for one year.” The DGO has no records of surrendering any funds to the state treasury.

In fact, the Treasury’s Unclaimed Property Division only recently became aware of the escrow fund, and division officials met with their DMME counterparts in October, a Treasury official said.

“We really haven’t made a determination. We’re still in discussions,” Vicki Bridgeman, the Unclaimed Property Division’s director, said in late November.

Any money seized from escrow would go into a state fund that provides low-interest loans to localities that build public schools and could be claimed, in theory, at any time by owners.

Missing for years

What happens when a gas corporation authorized by the state to produce someone else’s gas fails to file the proper paperwork?

A 90-year-old woman whose family did not want her named is owed thousands of dollars but doesn’t get paid for four years.

The heirs of Ercil Cook check his balance in escrow and think they are entitled to 12 cents.
And it’s impossible to know what happened to the mineral interests of Ducinia Stacy, of Grundy, Va.

Instead, the royalties that should go into the pockets of owners, or into escrow, stay parked in limbo within corporate accounts of gas operators.

Denny Sutherland knew he should be getting paid. He signed a lease, and he could read the gas meter on well V-505254 – a very hot well that drained as much as 26.5 million cubic feet a month – approximately enough to heat 10 households for about 30 years.

Four years passed, V-505254 drained half a billion cubic feet of gas, and Sutherland never received a check. Whenever he spoke with an agent of the gas operator, Equitable Production Co., he got a different answer.

Sutherland, a 63-year-old builder and ex-Marine who lives near Haysi, Va., wasn’t thinking of himself; he had very little acreage in the gas unit. But a 90-year-old relative of his in Bristol had a substantial interest.

“I knew if she didn’t get it pretty soon, she never would,” Sutherland said in an interview.

In July, Sutherland and a cousin visiting from New Mexico decided to get to the bottom of the issue.

Lois Wark, who retired as an assistant managing editor at *The Philadelphia Inquirer*, trekked to the

Division of Gas and Oil in Lebanon, Va., to inquire about the royalties. There, Diane Davis, one of two DGO employees who monitor Virginia Gas and Oil Board's records, discovered that Equitable had never filed a supplemental order – the crucial document that shows which owners in a gas unit have leased, and which should receive royalties in escrow.

Within the month, Denny Sutherland received a check for $4,900; his 90-year-old relative received $23,000. The royalty statements each received do not indicate whether the royalties earned interest, according to copies reviewed by the *Herald Courier*.

The system did not self-correct in the case of V-505254. It took someone who was expecting a payment to discover the error and push for answers. In the case of someone whose royalties are escrowed, no one is waiting for a check.

The board files

The Division of Gas and Oil keeps a file for gas units in which the Virginia Gas and Oil Board has forced landowners to lease their mineral rights to a private energy company, a practice known as forced pooling. The files correspond to individual sub-accounts in escrow, and they contain the details that reveal which owners have royalties in escrow.

Anyone can examine the files, as long as they do so where a DGO staff member can see them.

In recent months, on the advice of its attorney, the DGO has zealously guarded its files, requiring anyone who wants to look at them to do so "where we can oversee the process," a spokesman explained.

"It's not a mistrust of anyone in particular," said Mike Abbott, public relations manager for the Department of Mines, Minerals and Energy. "We're the sole keeper of those files. These are the original copies of records, and we may not have duplicates."

Abbott said he knew of no cases when documents had been taken or compromised. Actually, at least two files are missing.

The files for units Z-12 and V-12, both for wells in the Vansant area of Buchanan County, could not be located three months after the *Herald Courier* requested access to them. Neither unit received any deposits in escrow from January 2008 to June 2009; combined, their balances total almost $690,000.

Davis, programs administrator at the DGO, said the files were not lost, but that she would recreate them by going to local courthouses and copying the orders that have been recorded there.

Occasionally, a board file contains a forlorn objection from a force-pooled owner, like the letter Ducinia Stacy wrote on July 6, 2004.

"I do not think the Gas Company should be allowed to just take people's property (the gas rights) when they do not own them and the property owner does not want them to have them," she wrote. "I don't think this is right and I object for all the good it does me."

It isn't clear what happened to Stacy and other force-pooled owners in unit I-39 because the gas operator, CNX, has not submitted a supplemental order.

Gas operators are required to file this paperwork within two months of the board's order giving a company the right to produce gas belonging to force-pooled owners. Without a supplemental order, the escrow account for a unit cannot receive any royalties, and many contain only the initial “rental” payment of $5 an acre for force-pooled owners.

“I’m unaware of any case where our system hasn’t caught up with [paying royalties] as it did in the W-8 instance,” said Cathy St. Clair, a CNX spokeswoman. “We’re convinced we’re paying royalty monies that are required on wells we drill into that state account, or into an internal suspense account awaiting transfer” to the escrow fund, she said.

In reviewing 12 board files for gas units with high percentages of owners who did not agree to lease, the *Herald Courier* identified six units operated by CNX that lacked supplemental orders. The combined balance of those units is less than $250, even though the wells have been producing for at least four years.

St. Clair would not comment when presented with the unit names and identification numbers that lacked supplemental orders.

Two of these units show only one unknown owner, Ercil Cook, who has 1/100th of an acre in one tract, and 7/100ths of an acre in another. Over the six years that wells in these units have produced gas, Cook’s interest would entitle him or his heirs to about $938, according to average monthly prices on the Columbia Gas Transmission, an interstate pipeline on which CNX moves gas.

The combined sub-accounts for Cook’s interest show 12 cents.

Open questions

The *Herald Courier’s* analysis found 11 gas units in Dickenson County in which an unknown owner, the now-defunct Yellow Poplar Lumber Co., has rights to 100 percent of the gas underground. The wells on those units have produced 700 million cubic feet of gas since 2006, meaning substantial royalties should have been deposited into escrow.

Yet the sub-accounts in escrow received no deposits for a year and a half, and contained only the standard rental payment of $5 per acre.

When presented with this information, Kevin West, managing director of external affairs for EQT, Equitable’s corporate parent, acknowledged that his company had failed to make required monthly payments into escrow, and pledged to deposit the correct amounts with interest.

With regard to the Yellow Poplar units, he said, “There are some situations which I can’t explain, you know, somebody made a mistake in the manner of making the instruction on things getting paid. Yellow Poplar could well have been one of those situations.”

The DGO already was aware of the Yellow Poplar discrepancies before fielding the *Herald Courier’s* questions, Director David Asbury responded.

“Staff expects the [. . .] subject issues to be resolved before year’s end,” he wrote.

In fact, the DGO was alerted to the Yellow Poplar issue more than a year ago. Catherine Jewell, a Bristol, Va., resident who has been a relentless critic of the Virginia Gas and Oil Board, e-mailed the DGO in November 2008, noting the low balances in several Yellow Poplar units.

She received no reply.

On Sept. 25, a Tazewell, Va., attorney named T. Shea Cook wrote a letter to Butch Lambert, chairman of the Virginia Gas and Oil Board, and copied several Southwest Virginia legislators. Cook attached an affidavit from Jewell, stating she had audited 24 gas units in which Yellow Poplar owned gas interests and estimating that the accounts were missing close to $750,000.

“Your board has been charged with guarding these accounts and protecting the interests of the gas owners whose gas was essentially seized by the board,” Cook wrote. “These accounts need to be audited, and not just a checkbook audit.”

Coming Saturday: In the past 10 years, the escrow balance has tripled – all without a single audit.

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Underfoot, Out of Reach, Part Seven: An audit long delayed

Earl Neikirk|Bristol Herald Courier

Members of Virginia’s Gas and Oil Board, shown in a public session, have clashed for a year over how thorough of an audit they wanted.

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By Daniel Gilbert | Reporter / Bristol Herald Courier
Published: December 12, 2009
Updated: December 18, 2009
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Since 1999, energy companies have more than doubled the number of wells that drain natural gas in Southwest Virginia, producing 128 billion cubic feet of gas last year - a quantity that would fetch $1.2 billion for gas producers at average regional prices for 2008.

As natural gas profits have soared, so has the balance of an obscure state-run escrow fund, which holds royalties belonging to thousands of landowners whose ownership is in dispute or whose whereabouts are unknown. In 10 years, the total funds in escrow have ballooned from $3.6 million to more than $24 million – all without a single audit to determine if energy companies are making the legally required deposits into escrow.

For the past year, members of the state regulatory board charged with overseeing the escrow fund have been locked in debate over how deeply to probe gas corporations' compliance with making royalty payments into the fund. Some on the board have called for a forensic audit, while another member strenuously objected that such an audit "will be opening a door that I do not think we want to or need to go through," according to interviews and internal communications obtained by the *Bristol Herald Courier* through a Freedom of Information Act request.

The documents shine a light on the board's private deliberations, and the deep division among members that discussion of an audit has provoked. They also reveal that board members actually voted to award a contract for an audit nine months ago.

On March 5, David Asbury, the main state official responsible for managing the Virginia Gas and Oil Board's business, announced to board members that they had voted 4-3 to hire a Colorado accountant to perform the audit. The accountant, Mary Ellen Denomy, came with a string of letters attached to her name, including abbreviations for "Certified Fraud Deterrent Analyst" and "Certified Forensic Financial Analyst." Her price tag for the audit: $106,000.

At 11:57 a.m., Asbury e-mailed board members that they had selected Denomy and that all bidders would be notified of the board's decision that afternoon.

It never happened.

At 12:25 p.m., Sharon Pigeon, the senior assistant attorney general who advises the board, sent an urgent reply to Asbury, voicing a concern that he was about to take action "in an illegal closed session."

"Board action is not official until taken in an open meeting, so I assume you plan to call for a vote on this on the 17th," she wrote, referring to the board's hearing later in March. "I also assume there is reason to support the decision in the event there is a challenge to accepting the highest bid, so someone needs to be prepared to offer that information at the meeting."

Butch Lambert, the board chairman who Pigeon copied on her e-mail, responded at 1:06 p.m.

"Just so that we are above board with this, I think that we should follow Sharon's recommendation. We can do this first thing."

At the March 17 hearing, the board members went into a closed session to discuss the audit. When they re-emerged, public board member Mary Quillen moved to "drop those proposals that were received as not meeting the guidelines."

Bruce Prather, the board member who represents the gas and oil industry, seconded the motion, and the board voted to readvertise the contract.

"We're not auditing it"

Whenever gas companies make payments into escrow, they attach statements that show the volume of gas that a well produced, what it sold for and whatever deductions the company made in getting the gas to market. But bankers at Wachovia, which has managed the account since 2001, don't look at these statements.

"I will tell you that the information is on there," Patrick Dixon, a senior vice president for Wachovia, told Gas and Oil Board members at a July hearing. "We're just not doing anything with that information. We're not auditing it. We're not in any way proving whether it's right or wrong."

It's unclear how long board members knew they had access to this information; Asbury in April asked Wachovia for a "sample of the checks and the accounting that they receive [from gas operators] month over month," which he said he provided to board members.

The last audit of the escrow fund was in 1999. It cost $4,000. In their report, accountants at the Central Virginia firm of Robinson, Farmer, Cox Associates wrote that though they performed compliance tests with state laws and board regulations, "providing an opinion on compliance with those provisions was not an objective of our audit and, accordingly, we do not express such an opinion."

Asbury, in an e-mailed response to *Herald Courier* inquiries, wrote: "We balance the need to audit against the need to keep management fees charged to the account to a minimum." Meaning: The people whose royalties are in escrow will foot the bill for any audit, not the agency in charge of ensuring the integrity of the fund.

Only two state employees are responsible for monitoring payments into about 950 sub-accounts in escrow – active and inactive – and ensuring that companies file the required paperwork: Asbury, the director of the Division of Gas and Oil, and Diane Davis, the DGO's programs administrator.

Asbury said that the DGO's parent agency is expanding its electronic reporting system with "automated quality checks" to include the escrow fund. Currently, the DGO has no such system in place.

Perhaps out of necessity, Asbury has outsourced part of his watchdog function to the companies he watches.

Asked if it was anyone's job to review operators' monthly accounting statements sent to Wachovia, Asbury sidestepped the question in a written response, noting that "major gas producers are publicly held companies" and that "payments into escrow [. . .] are internally and externally 'audited' transactions."

The *Herald Courier*, in comparing escrow deposits with gas production during 2008 and 2009, found that hundreds of individual accounts did not receive royalty payments for months when the corresponding wells produced gas.

The analysis also revealed 20 duplicate sub-accounts that appear to receive payments from the same gas wells, underpayments and overpayments, accounts that should have been closed out years ago – and one account that was closed out, only to reappear months later with a negative 37 cents.

There is a cost to extraneous accounts: Wachovia charges $8 per account each month. The bank's servicing fees have exceeded the amount of interest earned on the fund's deposits for most of 2009, resulting in a loss of nearly $17,000 for the first 10 months of the year.

Board divisions

On March 6, the day after Asbury notified board members the results of their votes on who would audit the escrow fund, an agitated Bruce Prather phoned the DGO director.

At 3:50 p.m., Asbury e-mailed Lambert about the conversation. "Board member Prather called and was upset about the pending decision for the [request for proposal] Escrow Audit," he wrote.

"Do you know what he is upset about?" Lambert replied.

"He had done research regarding the chosen candidate/proposal," Asbury wrote, referring to Mary Ellen Denomy, the Colorado CPA. "He has concerns about the candidate's testimony against certain gas companies and their interests out west in state court."

In his research, Prather may have seen a March 2007 article in the now-defunct *Rocky Mountain News*, in which western royalty owners christened Denomy "Erin Brockovich" – a reference to a tenacious woman who took on an energy giant in a pollution case and was lionized on the big screen by actress Julia Roberts.

When asked about his concerns in November, Prather said, "Me? I don't know where that came from." Asked if he denied making the comments Asbury referenced, Prather said, "I'm not saying anything."

In a phone interview, Denomy said, "There should be no reason for a company to feel threatened by an accountant. I'm trying to make sure monies are not being misappropriated. I'm just a bean-counter."

For a year, board members have clashed over how thorough of an audit they wanted.

In February, public member Peggy Barber, without having seen the bids from would-be auditors, informed Asbury, "I would like to choose the lowest bidder for this project as the end result should ultimately be the same." Barber, dean of workforce development and continuing education at Southwest Virginia Community College, did not return phone calls or an e-mail seeking comment.

Katie Dye, a public member from Buchanan County, has called for a "forensic audit," and Bill Harris, a public member from Wise County, has supported a more thorough audit.

On the other side, Mary Quillen, another public member, voiced a strong objection to auditing the financial records of gas operators. On Aug. 10, Quillen e-mailed Asbury with her comments on the pending escrow audit.

"I do not want this to be misinterpretated (sic) to mean we are going to audit each operators financial records," Quillen wrote. "This will be opening a door that I do not think we want to or need to go through. There are some on The Board and members of the public (regular attendees of the meetings) who will take this opportunity to jump on this as a means of addressing their own agendas."

Quillen, director of programs for the University of Virginia's Southwest Center in Abingdon, did not return phone messages or an e-mail seeking comment. When approached by a reporter during a break at the Nov. 17 board hearing, Quillen said, “This is not an appropriate time to have a discussion with you.”

Asked to suggest an appropriate time, Quillen said, “I have no comment at this time. No comment.”

Prather seems to share Quillen’s view on the scope of the audit. When asked to verify his position, Prather said, “It sounds to me like you have access to our closed meetings.”

When pressed, he said that Pigeon, the board’s attorney, advised them against a forensic audit.

“Ms. Pigeon told us that this was our legal position,” Prather said. “She told us we couldn’t, we can’t take this thing outside the board and allow a forensic audit of these companies.

“That’s absurd,” he added. “Do you know how much that would cost?”

The upshot

On Sept. 21, the board published a revised request for bids for the audit, adopting much of Dye’s proposed language. The successful bidder will randomly audit 35 individual accounts in the escrow fund and compare actual payments against expected payments based on the board’s files, which detail how much production in a gas unit is subject to escrow.

The auditor’s task could be significantly complicated by missing supplemental orders – the crucial document that shows what percentage of royalties should be escrowed. The *Herald Courier*, in reviewing 12 Gas and Oil Board files with large percentages of owners who did not agree to lease, found that six of them were missing supplemental orders. When confronted with this, the Department of Mines, Minerals and Energy – DGO’s parent agency – acknowledged a “backlog of incomplete supplemental board orders.”

Without a supplemental order, it is impossible to determine what should be in an individual account in escrow.

Some board members are still unsatisfied with the audit’s scope.

“We would like for it to have taken a different direction,” Harris, the public member from Wise County, said in an interview. He described the published proposal as a “verification process rather than a forensic process.”

“I’m still not sure we’ll get some of the answers to the questions you’re raising,” Harris said. “We’re going to sort of wait and see what comes out of this.”

Coming Sunday: For royalty owners, it’s sue, split or do nothing.

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Southwest Virginia’s Natural Gas, Underfoot, Out of Reach, Part 8: Sue, split or do nothing

David Crigger and Earl Neikirk

The tangled web of natural gas rights has left landowners struggling to cash in on their share of the profits. From top left, Ferrel Whited, Attorney Peter Glubiak, Jamie Hale, Shirley Keen, Bill Harris, Delegate Terry Kilgore and David Asbury.

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FOR MORE INFORMATION, including a database of accounts associated with wells, click here.

By Daniel Gilbert | Reporter / Bristol Herald Courier
Published: December 13, 2009
Updated: December 14, 2009
» 3 Comments | Post a Comment

In three minutes, the Virginia Gas and Oil Board can force a property owner to lease his mineral rights to a private energy company.

The state regulatory body exercises this power more than a hundred times a year, converting Southwest Virginia's vast underground pools of natural gas into the fuel that heats homes and businesses, and tipping millions of dollars to the companies that harvest it.

But for the mineral owner forced to lease, the monetary rewards come far less easily – or not at all. By the time Earl Whited, of Russell County, Va., died in 2006, more than a dozen gas wells on his property had sucked up over 2.5 billion cubic feet of gas in five years. The former bus driver never saw a penny.

People like Whited, forced by the state to lease their mineral rights, are supposed to be compensated by the corporations that drain their nonrenewable resource. But ongoing conflicts over who owns the gas mean that millions of dollars in royalties are funneled into an opaque escrow account that the state does not routinely monitor for compliance. Getting royalties out of the $24 million escrow account requires "sticks of dynamite," in the words of one attorney who has spent years trying.

Jamie Hale, a 37-year-old truck driver in Buchanan County, Va., wants his royalties for his ailing mother.

Graham Tiller, 77, a retired chemical plant worker in Chester, Va., wants his royalties to help send his grandson to college.

Shirley Keene, 60, a disabled diabetic from Keen Mountain, Va., wants her royalties to take the edge off her insurance premiums.

Theresa Brents, a retired librarian in Stuarts Draft, Va., had never heard of the escrow fund where her royalties are held.

The plight of the force-pooled landowner sometimes pricks the conscience of one of the seven board members who enable the system.

"I don't always feel comfortable about what I'm doing," Bill Harris, a public member from Wise County, said in a November interview. "It's the whole 'industry-versus-citizen' thing where the industry always wins, and to me, it's just real disturbing."

Harris, who taught physics, math and photography at Mountain Empire Community College before retiring in June, votes to force-pool mineral owners because state law leaves him few alternatives.

"The state says that if certain things are in place, we have to have a really good reason not to approve that," he said. "I'd love to see the laws rewritten to give citizens more power. I just don't think people get enough money."

The methane gas that inhabits the coal seams of Southwest Virginia is now big money – and the subject of a legal tug-of-war between people who own the gas beneath their land, and the coal companies that purchased their coal. Despite a 2004 Supreme Court of Virginia ruling in favor of gas owners, coal companies have shown their willingness to spend years in court fighting for their share of coalbed methane royalties.

Unless a gas owner sues or agrees to split such royalties with a coal company, the funds will accumulate in escrow, and Ferrell Whited is resigned to this third option.

Whited and his siblings – the heirs of Earl Whited – went through four years of litigation with a coal company over coalbed methane royalties and emerged with 50 percent – half of what they sought. The former coal miner has lost his appetite for lawsuits and split agreements; he'll deed his remaining mineral interests to his grandchildren and leave it to them to extract royalties from escrow.

Except that by that time, Whited's money may no longer be in escrow. Once an individual account in escrow ceases to receive payments from gas production, it is considered unclaimed property and may have to be surrendered to the state treasury, throwing up a new series of bureaucratic barriers to collecting the money.

In June, David Asbury, the state official who oversees the escrow fund on behalf of the Gas and Oil Board, told an assembled crowd at a public meeting in Grundy, Va., "We would like for that escrow account to be zero. We don't have a goal to grow the escrow account."

Yet the fund continues to accumulate royalties faster than Asbury and the board can disburse them. Two months after Asbury spoke, on Aug. 11, the board published a request seeking bids from banks to manage the escrow fund. Buried in the 71-page document is a sentence that powerfully, if casually, underscores the difficulty of getting the fund to zero: "It is estimated that twenty-five to fifty million dollars may be held in escrow at any one time."

The size of the escrow fund has dismayed some area legislators and stunned others.

"We have got to find some better way of getting those monies out of escrow," Delegate Terry Kilgore, an attorney and senior Republican lawmaker from Gate City, Va., said in an interview.

"I was shocked to see your number, $24 million?" Kilgore said. "I don't think it was ever the intent of the General Assembly to have that kind of escrow account."

Peter Glubiak, the attorney who won the 2004 Supreme Court ruling for gas owners in Buchanan County, believes legislators could fix the escrow problem with the stroke of a single sentence.

Noting that an earlier law presumed that people owned the gas beneath their surface, Glubiak said, "What needs to happen is a simple reversal, reinstituting the presumption that if you own the land, you own the gas. That way, the burden would be on the coal company to come in and affirmatively prove [coalbed methane ownership]. It isn't the poor landowner who has to hire a lawyer and go to court and spend a lot of money. And you would get rid of 75, 80, 90 percent of what's in escrow."

Failing any better way to retrieve royalties from escrow, mineral owners are considering their options.

At his home outside Richmond, Va., Graham Tiller reads the minutes of the board hearings online, scanning them for details on what kind of deals gas owners are striking with coal companies over coalbed methane royalties. Recently, he saw one in which the gas owner received 80 percent of the royalties, and he's been talking with an agent of the company that owns the coal where he owns the gas.

“I’m thinking strongly about seeing if I can make a deal with them – if I can get the right kind of deal,” he said. “I’m getting old, and I’ve got a grandson to send to school. I can’t afford a lawsuit by myself, but I’m not going to give it to them.”

Theresa Brents is looking for a lawyer.

Shirley Keene is looking for her fourth lawyer.

Jamie Hale is working on a plan that does not involve a lawyer. During the 10 years that CNX Gas has sucked coalbed methane from beneath his 40-acre property, he has not received a dime. Assuming the Hales could recover 100 percent of the royalties in escrow, their interest would entitle them to approximately $266,000 – less whatever CNX deducts to get the gas to market.

“What I had in mind – I don’t know that I’d get anywhere with this – is my next day off, going to the courthouse and speaking with the judge if I can,” he said.

“If I can, I’ll get a declaratory judgment order against CNX Gas or whoever,” he said, although his conflict is actually with the coal owner, Hugh MacRae Land Trust.

“That’s my next step – talking to a judge or a legal representative at the courthouse. I can’t see us having to get an attorney to get what is rightfully ours. I mean, it’s not right. If you do hire an attorney, you might as well take a split agreement,” he said.

Then he sighed.

“I really don’t know where to go or what to do.”

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Flag Comment Posted by horselady on December 14, 2009 at 3:58 pm

I leased with the gas company and get a couple hundred dollars every month. That might not sound like much to you, but it helps me buy food and milk for my grandbabies. I've got neighbors who didn't lease and were force pooled. You all may fuss about this law being unfair, but why would it be fair for that neighbor to keep me from getting my money. I'd be hurting without that money.

The company spent a lot of money to drill the well. I wouldn't be able to come up with that kind of money to drill a well on my property by myself. Leasing my gas makes sense to me. I'm basically getting over $1500 a year to do nothing! That's money I couldn't live without.

Flag Comment Posted by bbobpm on December 14, 2009 at 1:57 pm

another case of rape. first the timber then coal.now the gas.the people said no. but they take it like they have a right to do what ever they wish. NO MEANS NO you cannot do this to the people anymore.

Flag Comment Posted by lswark on December 13, 2009 at 12:30 pm

Every mineral owner from Southwest Virginia—every reader, for that matter—should thank Daniel Gilbert and this newspaper for exposing this system for what it is: a ripoff of private property. And every one of us should let members of the VA Legislature know that we won't sit down and shut up until they rectify it.

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Media General’s Bristol Herald Courier wins Pulitzer for public service

DAVID CRIGGER/MEDIA GENERAL NEWS SERVICE

Bristol Herald Courier Publisher Carl Esposito (center) and Managing Editor J. Todd Foster (right) yesterday toasted the Pulitzer Prize for public service won by the newspaper. The eight-day series was written by Daniel Gilbert (left).

Related Info

2010 Pulitzer Prize winners and finalists

PULITZER PRIZE: Read the series by Daniel Gilbert

By Carol Hazard
Published: April 13, 2010
» 1 Comment | Post a Comment

The Bristol Herald Courier beat out major metropolitan newspapers yesterday to win the prestigious Pulitzer Prize for public service.

The newspaper, owned by Richmond-based Media General Inc., is a small daily with a circulation of about 30,000.

It won for the dogged reporting by Daniel Gilbert on the mishandling of natural-gas royalties owed to thousands of landowners in Southwest Virginia.

The newspaper celebrated yesterday with champagne and cake, said J. Todd Foster, the managing editor.

"Nothing compares to seeing your name at the top of the list," he said.

The newspaper focuses on watchdog journalism, Foster said.

Gilbert, 28, is one of 29 people in the Herald Courier's newsroom and one of seven reporters covering parts of Virginia and Tennessee in an area the size of Connecticut.

"Daniel is the most modest, unassuming reporter I have ever met," Foster said.

Gilbert's eight-part series, which ran in December, exposed a 20-year practice that allowed energy companies to profit without compensating landowners. It chronicled $1.1 million that was missing in escrow accounts and the inability of landowners to access money held in those accounts.

"Sometimes they [energy companies] pay the money but sometimes they don't, and no one has ever checked," Gilbert said.

"This is such a well-deserved honor for the Herald Courier and for our reporter, Daniel Gilbert," said Marshall N. Morton, president and CEO of Media General, which also owns the Richmond Times-Dispatch.

"He grappled with a complicated topic in such a way that he clarified it for our readers and stimulated reaction in the legislature," Morton said. "Great results and a great source of pride all around."

The honor marks the seventh Pulitzer, the most prestigious award in journalism, won by a Media General newspaper or key figure. The company owns three metropolitan and 20 community newspapers.

Gilbert's story also garnered a 2009 Investigative Reporters and Editors Award and a National Journalism Award by the Scripps Howard Foundation. The latter included a $10,000 cash award and a trophy.

The 94th annual Pulitzers were awarded by Columbia University on the recommendation of journalists and others. Times-Dispatch Managing Editor Peggy Bellows was a Pulitzer juror and judged the explanatory-reporting category.

Each award carries a $10,000 prize except for the public-service award, which is a gold medal.

"It's not that I thought they [the Pulitzer committee] got it wrong, but it certainly was unexpected," Gilbert said. "I don't know that anyone expects to win a Pulitzer."

Gilbert said he began reporting on the story in November 2008 and chipped away at it bit by bit. He had gathered data, but analyzing it was beyond his skills, he said. He appealed to editors to pay for him to take an computer-assisted investigative-reporting session.

"It was one of our greatest investments," Foster said. "It broke open the case."

Gilbert, a native of Prince William County, said he has no specific plans related to the honor. "I am fortunate to work at a newspaper that supports doing the hard stuff, the meaningful stuff, and not all newspapers do."

Gilbert graduated from the University of Chicago in 2005 with a bachelor's degree in international studies. He joined the Herald Courier in December 2007, and he covers courts and special projects.

Previous Pulitzer winners from Media General include Virginius Dabney with The Times-Dispatch for editorial writing in 1948; and Douglas Southall Freeman, who was editor of The Richmond News Leader from 1915 to 1949, for biography in 1958.

The Tampa Tribune was awarded a Pulitzer in 1966 for investigative reporting, and the Winston-Salem Journal received the 1971 public-service award.

Jeff MacNelly of The News Leader received Pulitzers for editorial cartooning in 1972 and 1978.

Contact Carol Hazard at (804) 775-8023 or chazard@timesdispatch.com .

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Flag Comment Posted by letiller on April 13, 2010 at 7:24 am

Congratulations Dan, we knew you'd get this, because you deserve it! Keep up the good work!

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